

Washington, D.C.

Page 1

1                   IN THE UNITED STATES DISTRICT COURT

2                   FOR THE WESTERN DISTRICT OF WISCONSIN

3                - - - - -                           X

4     UNITED STATES OF AMERICA,                   :

5     Plaintiff,                                   :

6                   v.                                   : Case No.

7     SPECTRUM BRANDS, INC.,                   : 3:15-cv-00371

8     a Delaware corporation,                   :

9     Defendant.                                   :

10        - - - - -                           X

11                   Washington, D.C.

12                   Friday, April 29, 2016

13                   Deposition of ALAN H. SCHOEM, a witness

14     herein, called for examination by counsel for

15     Plaintiff in the above-entitled matter, pursuant to

16     notice, the witness being duly sworn by MARY GRACE

17     CASTLEBERRY, a Notary Public in and for the District

18     of Columbia, taken at the offices of Mayer Brown,

19     1999 K Street, N.W., Washington, D.C., at 10:00 a.m.,

20     Friday, April 29, 2016, and the proceedings being

21     taken down by Stenotype by MARY GRACE CASTLEBERRY,

22     RPR, and transcribed under her direction.

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2		2	WITNESS EXAMINATION BY COUNSEL FOR
3	On behalf of the Plaintiff:	3	ALAN H. SCHOEM PLAINTIFF DEFENDANT
4	THOMAS E. ROSS, ESQ.	4	BY MR. ROSS 6
5	ALAN P. PHELPS, ESQ.	5	BY MR. MULLIN 280
6	MONICA C. GROAT, ESQ.	6	AFTERNOON SESSION - 156
7	United States Department of Justice	7	
8	Consumer Protection Branch	8	
9	450 Fifth Street, N.W.	9	E X H I B I T S
10	Washington, D.C. 20001	10	GOVERNMENT EXHIBIT PAGE
11	(202) 305-3630	11	No. 84: Report of Alan H. Schoem 12
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13	HARRIET KERWIN, ESQ.	13	Schoem
14	Consumer Product Safety Commission	14	No. 86: Excerpt from Schoem trial testimony 113
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3	On behalf of Defendant:	3	No 72: 185
4	TIMOTHY L. MULLIN, JR., ESQ.	4	No 74: 20
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<p>1            P R O C E E D I N G S      2        Whereupon,      3            ALAN H. SCH OEM,      4        business address at 14809 Rolling, Green Way, North      5        Potomac, Maryland 20878, was called as a witness by      6        counsel for Plaintiff, and having been duly sworn by      7        the Notary Public, was examined and testified as      8        follows:</p> <p>9            EXAMINATION BY COUNSEL FOR PLAINTIFF      10      BY MR. ROSS:</p> <p>11          Q. Good morning, Mr. Schoem. My name is Tom      12        Ross. I'm a trial attorney with the U.S. Department      13        of Justice. Here to my right is Alan Phelps, senior      14        litigation counsel; Harriet Kerwin from the Consumer      15        Product Safety Commission; and Monica Groat, also      16        from my office. We're here at the offices of Mayer      17        Brown in Washington, D.C. for the deposition of Alan      18        Schoem in the ongoing lawsuit United States vs.      19        Spectrum Brands, Number 3:15-cv-00371 in the Western      20        District of Wisconsin.</p> <p>21          Mr. Schoem, have you been deposed before?</p> <p>22          A. Yes, I have.</p>	<p>1            A. Yes. It's Alan H. Schoem, 14809 Rolling,      2        R-o-l-l-i-n-g, Green Way, North Potomac, Maryland      3        20878.</p> <p>4          Q. And has Spectrum retained you as an expert      5        witness in this case?</p> <p>6          A. Yes, they have.</p> <p>7          Q. And I understand that you're asserting      8        expertise regarding the Consumer Product Safety      9        Commission's policies and procedures and also the      10       company's CPSC compliance programs, is that right?</p> <p>11          A. Yes.</p> <p>12          Q. Are there any other topics on which you're      13        asserting expertise in connection with your      14        testimony?</p> <p>15          A. With respect to Spectrum's policies and      16        procedures for reporting to CPSC or for evaluating      17        information to determine whether a report to CPSC      18        would be appropriate.</p> <p>19          Q. And based on your review of the case, have      20        you formed opinions in this matter?</p> <p>21          A. Yes.</p> <p>22          Q. And are those opinions fairly summarized</p>
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<p>1          Q. So you generally understand the ground      2        rules for a deposition?</p> <p>3          A. Yes.</p> <p>4          Q. Well, I'll just emphasize one which is you      5        should try not to talk over one another so that we      6        can have a clean transcript. Besides that, I just      7        ask that you please answer my questions as completely      8        and truthfully as you can and we should get through      9        the day.</p> <p>10         If I don't say the question very well or      11        you don't understand me, please ask me to repeat it.      12        I don't want misunderstanding to get in the way of      13        answers.</p> <p>14         Is there any reason that you can't provide      15        truthful and complete testimony today?</p> <p>16          A. No.</p> <p>17          Q. You're not on any medication or have any      18        kind of illness that would prevent you from      19        testifying truthfully?</p> <p>20          A. No.</p> <p>21          Q. Would you please state your business      22        address and your full name for the record?</p>	<p>1        in the second report you provided on April 22nd,      2        2016?</p> <p>3          A. Yes.</p> <p>4          Q. And are the bases of those opinions fully      5        stated in that report?</p> <p>6          A. Yes, to the best of my ability.</p> <p>7          Q. And all of the documents and other      8        materials that you reviewed are listed in your      9        report?</p> <p>10         A. Yes, except I don't know that I listed      11        CPSC statutes, Code of Federal Regulations. I      12        didn't -- I don't think I listed the Consumer Product      13        Safety Improvement Act, so statutory and Commission      14        interpretative regulations may not be in here.</p> <p>15         Q. Do you expect to testify at trial or in      16        hearing in this case?</p> <p>17          A. If I'm asked to do so, yes.</p> <p>18          Q. Now, before we get into the substance of      19        my questions here today, you generally understand the      20        subject matter of this action?</p> <p>21          A. Yes.</p> <p>22          Q. Do you understand that this is a case in</p>

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<p>1 which the United States is seeking civil penalties      2 and injunctive relief for violations of the reporting      3 requirement under Section 15(b) of the CPSC?</p> <p>4 A. Right, I understand the government has      5 alleged that Spectrum has violated the reporting      6 requirements and is seeking an injunction concerning      7 what I would call a compliance program to be able to      8 review information and determine whether a report is      9 required to CPSC.</p> <p>10 Q. And do you understand that the government      11 is also alleging that Spectrum knowingly distributed      12 in commerce products that were subject to a voluntary      13 recall subject to a public announcement at CPSC?</p> <p>14 A. Yes, but I wasn't asked to testify as to      15 that.</p> <p>16 Q. Is that not part of a CPSC compliance      17 program?</p> <p>18 A. It could be part of a compliance program,      19 yes, but I wasn't asked to testify about whether      20 there was a violation or not.</p> <p>21 Q. Well, we'll get more into the specifics      22 later but the CPSC and the CPSA deal with more than</p>	<p>1 in my report, treating them as one entity.      2 Q. That was going to be my next point.      3 Sometimes I'll refer to them as Spectrum and Applica      4 if it's necessary to make a distinction, but you      5 understand that for purposes of the present      6 litigation, Spectrum includes Applica?</p> <p>7 A. Yes.</p> <p>8 Q. I'm going to show you an exhibit that      9 we're marking as Government Exhibit 84.      10 (Government Exhibit No. 84 was      11 marked for identification.)</p> <p>12 BY MR. ROSS:</p> <p>13 Q. Mr. Schoem, if you turn to page 21 of this      14 document, it shows that this is the report that you      15 submitted on April 15th, 2016. Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. So this is the initial expert report that      18 you provided in this case?</p> <p>19 A. Yes.</p> <p>20 Q. And in this report, you opine both on      21 Spectrum's reporting obligation or lack thereof and      22 the state of its CPSC compliance programs, right?</p>
<p style="text-align: center;">Page 11</p> <p>1 simply the Section 15(b) reporting requirement, don't      2 they?</p> <p>3 A. Yes.</p> <p>4 Q. And there is a number of different ways a      5 firm can violate the Consumer Product Safety Act,      6 right?</p> <p>7 A. There are a number of prohibited acts in      8 the Commission statutes, yes.</p> <p>9 Q. And selling recalled products -- and I'll      10 just use that for shorthand because the statute is so      11 cumbersome -- is one of those prohibited acts?</p> <p>12 A. Yes.</p> <p>13 Q. Now, just so that we're all talking about      14 the same thing, you understand that the coffee makers      15 that are the subject of this matter were sold by      16 Applica Consumer Products between approximately 2008      17 and 2012?</p> <p>18 A. Yes.</p> <p>19 Q. So when you refer to the coffee makers,      20 I'm talking about those specific models, do you      21 understand?</p> <p>22 A. Yes. I use Spectrum in place of Applica</p>	<p style="text-align: center;">Page 13</p> <p>1 A. Yes.</p> <p>2 Q. And your conclusions are set forth on      3 page 21 in section 8, right?</p> <p>4 A. Yes.</p> <p>5 Q. To paraphrase, your first conclusion here      6 is that Spectrum did not have a reporting obligation      7 for the coffee maker at issue in this lawsuit, right?</p> <p>8 A. That is correct.</p> <p>9 Q. And is that your opinion for the entire      10 time period from 2008 until the company reported in      11 April of 2012?</p> <p>12 A. Yes. And again, it's based on the      13 documents that I reviewed that I listed in that      14 report.</p> <p>15 Q. Are there other documents about this case      16 that you haven't reviewed that might bear on your      17 opinion?</p> <p>18 A. Only if the government -- I only know what      19 documents I reviewed and they're listed. There were      20 incomplete files provided by the government so I      21 don't have those files.</p> <p>22 Q. You're saying there was an incomplete file</p>

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<p>1      in the instant case?</p> <p>2      A. Not in the instant case that I'm aware of.</p> <p>3      I mean, the government produced documents and I 4      reviewed those documents, but some of the files that 5      the government produced are not complete.</p> <p>6      Q. When you were retained as an expert in 7      this case, did you request from Spectrum's counsel 8      the materials you thought you would need to render an 9      opinion?</p> <p>10     A. No, they provided me with materials and in 11    some cases I may have asked for additional materials 12    that were provided. And then everything I looked at 13    is listed in the report.</p> <p>14     Q. So if you didn't list it in the report, 15    other than the legal standards that we discussed, you 16    didn't look at it?</p> <p>17     A. That's correct.</p> <p>18     Q. Now, the second paragraph here says that, 19    during the relevant time period, the Commission staff 20    consistently concluded that moderate risk of burns or 21    scalding from spilled coffee did not rise to the 22    level of a substantial product hazard. And again,</p>	<p>1      the compliance programs as they exist at present, 2      right?</p> <p>3      A. Yes. And when you say compliance program, 4      what do you mean? What specifically do you mean by 5      that?</p> <p>6      Q. I'm talking about the matters that you 7      discuss with respect to opinion 3 in your report, all 8      of the different processes and the different 9      functions that you discussed.</p> <p>10     A. Okay.</p> <p>11     Q. You're talking about those processes and 12    features as they exist today?</p> <p>13     A. Yes.</p> <p>14     Q. You don't know and weren't asked to 15    evaluate what their processes were, say, five years 16    ago?</p> <p>17     A. That's correct.</p> <p>18     Q. And you have no way of knowing what their 19    processes and procedures will be five years from now, 20    do you?</p> <p>21     A. No.</p> <p>22     Q. Would you kindly turn to page 15 of your</p>
<p style="text-align: center;">Page 15</p> <p>1      I'm summarizing that.</p> <p>2      Is that a separate opinion that you're 3      offering or is that a subset of your first opinion?</p> <p>4      A. I don't know that it matters. It's a 5      separate -- I'll call it a separate opinion.</p> <p>6      Q. I just want to make sure that I talk about 7      them correctly.</p> <p>8      And the third opinion that you list here 9      states that Spectrum had reasonable procedures in 10     place to allow it to evaluate information to 11     determine whether it had a reporting obligation to 12     the CPSC, right?</p> <p>13     MR. MULLIN: Let me object to the form of 14     the question. I think you said "had" and this says 15     "has." You may have misspoken.</p> <p>16     BY MR. ROSS:</p> <p>17     Q. Spectrum has reasonable procedures to 18     allow it to report to the CPSC. That's your third 19     opinion?</p> <p>20     A. Yes.</p> <p>21     Q. Now, with respect to your third opinion 22     here about compliance programs, you are talking about</p>	<p style="text-align: center;">Page 17</p> <p>1      report? Do you see the paragraph, it's the second 2      full one down that starts with, "My review of other 3      case files"?</p> <p>4      A. Yes.</p> <p>5      Q. And to paraphrase, you state that, based 6      on your review of those files, the CPSC has 7      consistently concluded that moderate risks from 8      coffee spills are not a substantial product hazard, 9      right?</p> <p>10     A. Yes.</p> <p>11     Q. Now, when you drafted this report and you 12    reached that conclusion, were you under the 13    impression that the CPSC had not found a substantial 14    product hazard in any coffee maker case in the last 15    10 years?</p> <p>16     A. No, when I -- no. I'm saying that the 17    Commission staff was consistent in its decisions. 18    Consistent to me doesn't mean always. It means 19    routinely or regularly. If you're getting at the one 20    case -- that's my answer.</p> <p>21     Q. Were you aware of that particular case 22    when you wrote this opinion, keeping in mind that</p>

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<p>1       this was your initial report that we're talking about 2       here?</p> <p>3       A. That particular case meaning the one where 4       the Commission staff made a preliminary determination 5       of hazard?</p> <p>6       Q. Yes.</p> <p>7       A. Yes, I was aware of that case.</p> <p>8       Q. And did you have the actual preliminary 9       determination form by the time you submitted this 10      report?</p> <p>11      A. Yes, I did.</p> <p>12      Q. And did you have a close letter from that 13      case indicating that a substantial product hazard had 14      been found at the time you submitted this initial 15      report?</p> <p>16      A. Yes. And while I amended this report, it 17      doesn't change my conclusion. The staff was still 18      consistent in its determinations.</p> <p>19      Q. Well, we'll get to that in a second. You 20      didn't think it was worth mentioning that there was a 21      case that found the opposite of the other ones you're 22      talking about here?</p>	<p>1       of a substantial product hazard, right?</p> <p>2       A. I'm referring to the fact that in all of 3       the other cases, the staff concluded there was no 4       substantial product hazard and, in that one case, the 5       staff made a preliminary determination that in their 6       view there was a substantial product hazard.</p> <p>7       Q. Right. So it's inconsistent in your mind 8       in the sense that the ultimate conclusion was 9       different from the other cases?</p> <p>10      A. Well, the ultimate conclusion was 11      different but the facts were very similar.</p> <p>12      Q. I'm going to show you a document that's 13      previously been marked as Exhibit 74. Just please 14      take a minute to review the document.</p> <p>15      A. I'm familiar with the document.</p> <p>16      Q. Mr. Schoem, is this the preliminary 17      determination that the CPSC made in case RP090423?</p> <p>18      A. Yes.</p> <p>19      Q. And when we were talking about the case 20      that you didn't mention in your initial report, this 21      is the case we're talking about, right?</p> <p>22      A. Yes.</p>
<p>1       A. Actually, I had forgotten. I mean, that's 2       all I can tell you is I forgot. I went back and 3       looked at my notes. I have notes that show that 4       staff had made a preliminary determination in one 5       case which, as I say in my supplemental report, it's 6       inconsistent with all of the other decisions that the 7       staff made.</p> <p>8       Q. Now, just so we're clear, we're talking 9       about case 9-423?</p> <p>10      A. RPO90423.</p> <p>11      Q. So when you were writing this opinion, you 12      didn't think it would be helpful or necessary to 13      disclose to the Court that the CPSC had in fact found 14      a coffee maker to be an SPH in the prior case?</p> <p>15      A. I wasn't trying to hide anything from the 16      Court. As I said, it was just inadvertently left 17      out. But it doesn't change my opinion because the 18      staff was still consistent. I consider that case to 19      be an aberration. It's inconsistent with all the 20      other decisions that the staff made.</p> <p>21      Q. And by it's inconsistent, you're just 22      referring to the ultimate conclusion of the existence</p>	<p>1       Q. Now, if you look at the first page, it 2       states that the potential problem is hot liquid, 3       grounds or steam can suddenly eject from the brewer 4       and scald consumers, right?</p> <p>5       A. Yes, that's what it says.</p> <p>6       Q. And under section 1 here, Defect, the CPSC 7       staff found that a defect did in fact exist, right?</p> <p>8       A. Yes.</p> <p>9       Q. Because T-disks apparently should not 10      suddenly explode, right?</p> <p>11      A. That's -- whatever the language is, yes.</p> <p>12      Q. Now, just to be clear, in our case where 13      we're talking about coffee makers where the handles 14      fall off. Do you dispute that the information that 15      Spectrum had reasonably supported the conclusion that 16      those were defective?</p> <p>17      A. If I were looking at that information, I 18      would say there is a problem with the handle. It 19      appears to meet the Commission's definition in its 20      interpretative regulation of what a defect is.</p> <p>21           And it wasn't that all the handles were 22      falling off. Some were coming loose. Some appear to</p>

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<p>1 fall off. Some cracked, some broke.</p> <p>2 Q. Just for shorthand, we'll refer to handle 3 failure as a handle breaking, but you sort of 4 understand the universe of different failures we're 5 talking about, right?</p> <p>6 A. Yes.</p> <p>7 Q. Because when somebody pours a cup of 8 coffee out of a carafe, they don't expect the handle 9 to fall off or break or loosen or any of those 10 things, right?</p> <p>11 A. Right.</p> <p>12 Q. And it's not what you would expect a 13 coffee maker carafe to be designed to do, right?</p> <p>14 A. Right. I'm sure Spectrum didn't design it 15 to do that, but that's correct.</p> <p>16 Q. So based on just a common sense 17 understanding of how coffeepots work, do you think 18 it's reasonable that this happening hundreds and 19 hundreds of times demonstrates a possible defect?</p> <p>20 A. Yes.</p> <p>21 Q. Now, if you would please turn to the next 22 page.</p>	<p>1 burns.</p> <p>2 Q. And based on your experience, are you 3 familiar with reports of hot coffee causing second 4 degree burns?</p> <p>5 A. In some of the files that I looked at, 6 there were reports of second degree burns.</p> <p>7 Q. And some of those reports in some cases 8 mention second degree burns requiring medical 9 treatment, right?</p> <p>10 A. Yes. And in all of those cases that I 11 reviewed other than this one, the staff closed those 12 cases without seeking any type of recall.</p> <p>13 Q. We'll get to that in a second. I'm just 14 asking --</p> <p>15 A. Right, but I wanted my answer to be 16 complete.</p> <p>17 Q. I'm just asking whether you dispute that 18 coffee, if hot enough, can cause serious injury to a 19 consumer.</p> <p>20 A. I suppose it can, yes.</p> <p>21 Q. Now, under Inherent severity of risk, 22 section 3 says, "The firm has received approximately</p>
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<p>1 A. Bates 18771?</p> <p>2 Q. That's right. Do you see the section 3 titled Severity of risk, or Severity of the risk?</p> <p>4 A. Yes.</p> <p>5 Q. Under that, it says, "Seriousness of 6 injury: Possible scarring to face, arms and chest 7 areas from second degree burns or possible serious 8 eye injuries." Did I read that right?</p> <p>9 A. Yes.</p> <p>10 Q. Do you dispute that hot coffee could cause 11 possible scarring to face, arms and chest areas from 12 second degree burns?</p> <p>13 A. I'm not disputing what the staff concluded 14 in this report.</p> <p>15 Q. I'm asking a little more broadly than 16 that. Based on your experience at the CPSC and out, 17 do you dispute that hot coffee can cause serious 18 burns?</p> <p>19 A. I think it's possible.</p> <p>20 Q. So that's, yes, it can cause serious 21 burns?</p> <p>22 A. It's possible that it can cause serious</p>	<p>1 435 reported incidents, 200 U.S. incidents, 61 2 reports of scalding or bodily contact," and it goes 3 on from there. Do you see that?</p> <p>4 A. Yes, I do.</p> <p>5 Q. Setting aside the other Applica cases for 6 a second, how does the number of incidents reported 7 in this case compare to the other files that you 8 reviewed?</p> <p>9 A. This is similar to some of the other files 10 that I reviewed. I'm sorry, if you set aside the 11 Applica cases?</p> <p>12 Q. I'm talking about --</p> <p>13 A. Non-Applica cases.</p> <p>14 Q. Non-Applica cases. All the other 15 Section 15 cases in the PDs that you reviewed, did 16 any of them have 435 incidents?</p> <p>17 A. I don't recall specifically. I don't 18 believe so.</p> <p>19 Q. Did any of them have close to that number?</p> <p>20 A. I would have to look at the files.</p> <p>21 Q. Did any of them have close to 600 reports 22 of burns?</p>

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<p>1        A. I would have to look at the files. If you      2 have them, I'm happy to look at the other preliminary      3 determinations that the staff made.</p> <p>4        Q. Well, is that part of what you did in      5 reviewing those case files and determining that this      6 was an aberration?</p> <p>7        A. Yes.</p> <p>8        Q. You looked not only at the ultimate      9 conclusion but also the number of incidents and      10 reported injuries and things of that nature?</p> <p>11      A. I looked at them, yes.</p> <p>12      Q. And you concluded that this was sort of in      13 the same realm, numerically, as those cases?</p> <p>14      A. Yes, especially when you take into account      15 the Applica cases which you wanted me to exclude but      16 if you take them into account, they're similar, at      17 least in one case.</p> <p>18      Q. Now, this analysis comparing all of these      19 other cases, is it set forth anywhere in your expert      20 report?</p> <p>21      A. Well, I talk about the other cases that I      22 looked at in my report.</p>	<p>1 contacts a consumer, is that the type of risk that      2 would lead to a conclusion that it could create a      3 substantial product hazard, and I said the staff was      4 consistent in its opinions and conclusions that that      5 was not that situation, didn't rise to the level of a      6 substantial hazard.</p> <p>7        Q. Now, when a preliminary determination      8 panel meets and a staff considers whether a product      9 poses a substantial product hazard, do they consider      10 the prevalence of the defect?</p> <p>11      A. They look at the likelihood, they look at      12 the severity, they look at the number of products      13 that are involved, they look at the incidents that      14 are involved. They look at the things that are on      15 that PD form.</p> <p>16      Q. And do they look at the number of      17 incidents involved because whether there is      18 1 incident or 1,500 incidents could bear on the      19 number of people who could potentially be harmed by      20 this product?</p> <p>21      A. Yes, you look at that, but if there is no      22 harm that can result in a substantial product hazard</p>
<p style="text-align: center;">Page 27</p> <p>1        Q. You just testified that when you concluded      2 that this was an aberration from the other      3 non-Applica cases, that you compared all these      4 different figures, right?</p> <p>5        A. Yes, I looked at all of the different      6 figures when I was making that statement in my      7 report.</p> <p>8        Q. And what I'm asking is just simply did you      9 set forth any of that detail analysis in your report?</p> <p>10      A. No, I didn't. And what I was looking at      11 is how the staff viewed hot liquid contacting a      12 consumer's body and the type of injury that could      13 result or that had been shown to have resulted from      14 that coffee or hot liquid contacting the consumer's      15 body. And in looking at that information and in      16 looking at the ultimate conclusions that the staff      17 reached, I was saying that the staff was consistent      18 in its decisions to close those cases.</p> <p>19      And as I say elsewhere in my report, I'm      20 not sure that it makes any difference whether there      21 is 100 or 200 or 50 or 1,000 incidents, the      22 underlying issue is still the same. If hot liquid</p>	<p style="text-align: center;">Page 29</p> <p>1        or a preliminary determination of a substantial      2 product hazard, it doesn't really matter whether it      3 was 1 incident or 50 or 1,500.</p> <p>4        Q. Now, preliminary determinations are not      5 made in all Section 15 cases, right?</p> <p>6        A. That's correct.</p> <p>7        Q. And you talk about that in your report?</p> <p>8        A. Yes. If the company reports on the Fast      9 Track, for example, there is no preliminary      10 determination made.</p> <p>11      Q. Well, they're also not made in preliminary      12 investigation cases, are they?</p> <p>13      A. They don't have to be made, that's right.      14 If it doesn't get escalated to what the Commission      15 staff calls a CA investigation, then there may be no      16 PD made.</p> <p>17      Q. And you also make note of the fact that      18 the CPSC doesn't share preliminary determination      19 forms with firms or make staff's analysis public,      20 right?</p> <p>21      A. That's correct.</p> <p>22      Q. And is the analysis that CPSC staff</p>

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<p>1      undertakes in making a preliminary determination      2      different than what the law requires firms to do in      3      determining whether they have to report to CPSC in      4      the first place?</p> <p>5      A. The reporting obligation is broader than      6      the obligation to conduct a recall.</p> <p>7      Q. Can a firm be found to have violated the      8      reporting requirement even if it turns out after the      9      fact that the product wasn't defective?</p> <p>10     A. I suppose so. As I say, I don't think the      11    staff has ever sought a penalty where it did not also      12    seek a recall.</p> <p>13     Q. Are you aware of court cases that have      14    construed that issue?</p> <p>15     A. Construed which issue?</p> <p>16     Q. Whether a firm can be found to have      17    violated the reporting requirement even if the      18    product ultimately turns out not to be defective.</p> <p>19     A. I don't recall a court case where the      20    product was not found ultimately to be defective. I      21    don't know if you're talking about Mirama case or      22    something else that you have in mind.</p>	<p>1      what the Commission has done in a variety of cases      2      where it has reached conclusions that products are a      3      substantial product hazard.</p> <p>4      Q. So the determination of whether a firm      5      violated its reporting obligation is not a legal      6      question?</p> <p>7      A. It's probably ultimately a legal question      8      for a judge or a jury.</p> <p>9      Q. As a general matter, do you agree that the      10    reporting standard has a lower threshold than the      11    standard that the staff applies in determining      12    whether a preliminary or a substantial product hazard      13    exists?</p> <p>14     A. Say that again, please.</p> <p>15     Q. Is the reporting standard subject to a      16    lower threshold than the threshold that the staff      17    applies in making a preliminary determination?</p> <p>18     A. As I said, the reporting obligation is      19    broader than the obligation of a company to conduct a      20    recall.</p> <p>21     Q. Now, one last question about this      22    document. Under the substantial hazard</p>
<p style="text-align: center;">Page 31</p> <p>1      Q. And can a firm be found to have violated      2      the reporting requirement even if it turns out      3      ultimately that the product did not present a      4      substantial product hazard?</p> <p>5      A. In theory, yes.</p> <p>6      Q. Isn't the point of the reporting      7      requirement to get information into the hands of the      8      CPSC so that the CPSC can do a more thorough      9      evaluation of the risk and decide on a remedy?</p> <p>10     MR. MULLIN: Object to the form of the      11    question, but you can answer.</p> <p>12     THE WITNESS: Generally, yes. But where a      13    firm has knowledge and doesn't believe that a product      14    rises to the level that they could create a      15    substantial product hazard or presents an      16    unreasonable risk of serious injury or death, the      17    reporting obligations are triggered.</p> <p>18     BY MR. ROSS:</p> <p>19     Q. And that's your legal opinion sitting here      20    today?</p> <p>21     A. No, I wouldn't call it a legal opinion.      22    It's just fact based. I'm looking at the facts of</p>	<p style="text-align: center;">Page 33</p> <p>1      classification B, staff notes --</p> <p>2      A. Are you reading from the report?</p> <p>3      Q. I'm reading from the report.</p> <p>4      MR. MULLIN: No, he's looking at the PD      5      form.</p> <p>6      BY MR. ROSS:</p> <p>7      Q. Or PD form. Well, first of all,      8      section 3, Assessment of the sustainability of the      9      hazard, the staff finds here that this was a      10     substantial product hazard classification B, right?</p> <p>11     A. Yes.</p> <p>12     Q. And staff notes at the very end that the      13    firm reports 19 incidents with the redesigned units      14    including the incident involving the 10-year-old girl      15    whose second degree burns required surgery. Do you      16    see that?</p> <p>17     A. Yes.</p> <p>18     Q. Now, at your time at the CPSC which      19    spanned, what, almost 40 years, was it?</p> <p>20     A. 31.</p> <p>21     Q. 31? I can't count. In your 31 years at      22    the CPSC, how often did you tell firms that you</p>

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<p>1 didn't want to know about products that could cause 2 second degree burns requiring 10-year-old children to 3 have surgery?</p> <p>4 MR. MULLIN: Object to the form of the 5 question.</p> <p>6 THE WITNESS: I have no idea.</p> <p>7 BY MR. ROSS:</p> <p>8 Q. Does it sound like something you would 9 have said when you were in the Office of Compliance?</p> <p>10 A. I would have to look at the facts to 11 determine what I would say or wouldn't say to a 12 company.</p> <p>13 Q. But if you found that a product had a 14 defect which was capable of causing burns to children 15 requiring them to have surgery, do you think you 16 would have told the firm, no, thank you, I don't 17 think the CPSC needs to know about that issue?</p> <p>18 A. I would want to look at what was going on 19 in that situation. I would ask the company to let me 20 know what was going on. I would want to look at 21 whether the surgery was related to the burns, whether 22 there was something else going on. I would want to</p>	<p>1 or whether it was something that the Commission -- 2 where they didn't need to submit a full report.</p> <p>3 Q. But unless the Commission found out about 4 this fact itself somehow, it really would have been 5 reliant on the firm to raise this issue, wouldn't it?</p> <p>6 A. Firms have an obligation to report to the 7 Commission if they have reportable information.</p> <p>8 Q. So that the CPSC then can assess the risk 9 and decide whether corrective action is necessary, 10 right?</p> <p>11 A. Right, whether it believes, in its 12 opinion, that corrective action is necessary.</p> <p>13 Q. And by corrective action, we're talking 14 about recalls, right?</p> <p>15 A. Either repair/replacement or refund, which 16 in shorthand is a recall.</p> <p>17 Q. I'm going to show you an exhibit, 18 Mr. Schoem, that we marked as Government Exhibit 75.</p> <p>19 Mr. Schoem, are you familiar with this 20 document?</p> <p>21 A. Yes, I've seen it.</p> <p>22 Q. Is this what's known as a preliminary</p>
<p>1 get factual information.</p> <p>2 Q. Now, you're talking about in the process 3 of determining whether there is substantial product 4 hazard, right?</p> <p>5 A. Both substantial product hazard and 6 whether there is a reporting obligation.</p> <p>7 Q. But in order for you to get that 8 information in the first place, the firm had to tell 9 you about it, didn't it?</p> <p>10 A. If the Commission didn't have any 11 independent source for the information, then yes. I 12 mean, there were situations where companies would 13 call and say I've got this situation, do you think 14 this is reportable. And in some cases, the staff 15 would say, no, we don't think that's reportable and 16 in other cases, we would say, yes, we either think 17 it's reportable or why don't you provide us some 18 additional information and then we can give you some 19 more specific guidance.</p> <p>20 When I was there, we tried to work with 21 companies to give guidance or whether they really 22 needed to submit a full report under the regulations</p>	<p>1 determination or a PD letter?</p> <p>2 A. Yes.</p> <p>3 Q. And in this letter, staff is informing the 4 company that it's made a finding, or at least a 5 preliminary determination, of a substantial product 6 hazard under the Consumer Product Safety Act, right?</p> <p>7 A. Yes.</p> <p>8 Q. And unlike the preliminary determination 9 form itself, this letter would have been provided to 10 the firm, right?</p> <p>11 A. Yes.</p> <p>12 Q. Now, does this PD letter explain the basis 13 of the Commission's decision?</p> <p>14 A. Generally, yes.</p> <p>15 Q. And what do you mean by that?</p> <p>16 A. I mean it says specifically, hot liquid, 17 grounds or hot steam can suddenly eject from the 18 product and scald consumers.</p> <p>19 Q. Where are you reading?</p> <p>20 A. First page, the second paragraph, last 21 sentence.</p> <p>22 Q. And in your opinion, is that description</p>

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<p>1 sufficient for firms to know that they have to report 2 issues like this in the future?</p> <p>3 A. That's probably sufficient for BSH, Bosch 4 Tassimo, to know that the staff considers this to be 5 reportable, this being hot liquid, grounds or hot 6 steam suddenly ejecting from the product and scalding 7 consumers.</p> <p>8 Q. And if BSH had not received this letter, 9 how is it to know that this issue is reportable?</p> <p>10 A. It would look at the interpretative 11 regulation that the Commission has issued and the 12 criteria that the Commission has set forth and then 13 it would have to make a decision whether it has 14 information that it believes is reportable. This 15 helps Bosch inform its decisions in the future as to 16 whether it has a reporting obligation if it has 17 similar risks presented by one of its coffee makers, 18 in my opinion.</p> <p>19 Q. Now, did you have this document when you 20 wrote your initial report?</p> <p>21 A. Yes. Yes, I believe I did.</p> <p>22 Q. So like the preliminary determination</p>	<p>1 Q. On the second page here, do you see the 2 section Voluntary corrective actions?</p> <p>3 A. Yes.</p> <p>4 Q. The staff is requesting that the firm take 5 corrective action, right?</p> <p>6 A. Yes.</p> <p>7 Q. And is that because the CPSC cannot force 8 corrective action without taking legal action?</p> <p>9 A. Yes.</p> <p>10 Q. And so the CPSC in most cases agrees with 11 the firm on the corrective action that's taken, 12 right?</p> <p>13 A. Well, they ask the firm to take corrective 14 action. The firm will submit a proposed corrective 15 action plan and then the Commission staff will 16 evaluate that plan and decide whether it's acceptable 17 as proposed or whether it needs to be modified in 18 some way.</p> <p>19 Q. So the firm consults with the CPSC during 20 this process and they ultimately arrive at a 21 corrective action for that case?</p> <p>22 A. Consults in that the firm typically goes</p>
<p style="text-align: center;">Page 39</p> <p>1 form, you were aware that a substantial product 2 hazard had been found in this case, right?</p> <p>3 A. I had forgotten but I was aware in that it 4 was in my notes, I had read the document, and when I 5 was writing my report I just didn't think of it 6 because it was an outlier.</p> <p>7 Q. So you just excluded it as an aberration?</p> <p>8 A. I wouldn't say I -- I didn't intentionally 9 exclude it when I was writing my report. I had 10 forgotten about it. But it didn't change my report 11 and my conclusions because I do consider this to be 12 an outlier.</p> <p>13 Q. It wasn't important enough to remember?</p> <p>14 A. That's a matter of opinion, I guess. It 15 doesn't -- because it doesn't change my opinion, it 16 wasn't important in that sense, but if I had it to do 17 over again, I would have specifically referenced it.</p> <p>18 Q. Now, in a PD letter like this, is CPSC 19 staff, at least in this particular case, requesting 20 that the firm engage in a voluntary corrective 21 action?</p> <p>22 A. What's the question?</p>	<p style="text-align: center;">Page 41</p> <p>1 back, puts together a corrective action plan, submits 2 it to the Compliance staff, the Compliance staff 3 reviews it and then there is a discussion if the 4 Compliance staff thinks that changes should be made 5 in the corrective action plan that's been proposed by 6 the company. So it's a discussion that take place.</p> <p>7 Q. Mr. Schoem, I'm going to show you a new 8 exhibit which we're marking as Government Exhibit 85. 9 (Government Exhibit No. 85 was 10 marked for identification.)</p> <p>11 BY MR. ROSS:</p> <p>12 Q. Now, if you would please take a look at 13 page 21 and verify that this is the supplemental 14 report you provided on April 22nd, 2016.</p> <p>15 A. Yes, it is.</p> <p>16 Q. So we've already covered this but --</p> <p>17 A. We have. There is one other thing that I 18 should have changed in this report that I didn't 19 change.</p> <p>20 Q. Okay.</p> <p>21 A. When I went back and reread it, on page 22 16, in the -- is it the second paragraph, last</p>

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<p>1 sentence, says that, "There is no evidence that the      2 staff communicated with Spectrum, or anyone else in      3 the industry, a different position in the relevant      4 time period." I should have corrected that. That's      5 the sentence that's incorrect, because while they      6 didn't communicate with Spectrum, obviously they      7 communicated with Bosch a position different in that      8 relevant time period than they communicated to the      9 other companies and to Spectrum.</p> <p>10 But the only change between the April 15th      11 and April 22nd report that I did actually make was on      12 page 15.</p> <p>13 Q. And the reason that that didn't ultimately      14 affect your conclusions is because you had the      15 document and you considered it before you submitted      16 your initial report, right?</p> <p>17 A. Well, again, I said I forgot. I mean, I      18 would have included this in the original report and I      19 would have changed that sentence on page 16 in my      20 original report if I had remembered that the staff      21 had made a preliminary determination. I was looking      22 at a lot of documents in a very short time frame with</p>	<p>1 your report at least in terms of the three      2 conclusions that you reached, but we're going to      3 address them in a slightly different order.</p> <p>4 A. Okay.</p> <p>5 Q. I would first like to discuss topic 3      6 which is your discussion of Spectrum's compliance      7 programs.</p> <p>8 A. Okay.</p> <p>9 Q. Now, on page 1 of your report, you talk      10 about your experience as a consultant with Marsh USA,      11 right?</p> <p>12 A. Yes.</p> <p>13 Q. And you write, "I assisted firms in      14 complying with federal agency regulatory requirements      15 and industry voluntary standards." Do you see that?</p> <p>16 A. Where are you reading? Which paragraph?</p> <p>17 Q. The third paragraph down.</p> <p>18 A. Yes.</p> <p>19 Q. You say, "I assisted firms in complying      20 with federal agency regulatory requirements and      21 industry voluntary standards, complying with CPSC      22 reporting requirements, establishing procedures for</p>
<p style="text-align: center;">Page 43</p> <p>1 a very short fuse as to when the report had to be      2 submitted. I guess we got -- were able to get an      3 extra week's extension which allowed me to write a      4 report. So it was inadvertent that I didn't reflect      5 that the staff had made a class B determination.      6 That's all I can tell you.</p> <p>7 Q. I would just like it to be clear. This is      8 information that you had in your possession before      9 you wrote your first report, right?</p> <p>10 A. Yes, that is correct.</p> <p>11 Q. And had you not forgotten, you could have      12 included that discussion in your initial report?</p> <p>13 A. Yes.</p> <p>14 Q. So other than addressing RP090423, are      15 there any changes of note to this report?</p> <p>16 A. No, other than what I just mentioned that      17 I reflected that I wish I had changed on page 16.</p> <p>18 Q. In fact, your conclusions on page 21 are      19 verbatim what you concluded in your initial report,      20 right?</p> <p>21 A. Yes.</p> <p>22 Q. Now, I would like to discuss each topic in</p>	<p style="text-align: center;">Page 45</p> <p>1 minimizing the need for product recalls, preparing      2 for and deploying product recalls, and recovering      3 from product recalls." Did I read that right?</p> <p>4 A. Yes, you did.</p> <p>5 Q. Now, you were at Marsh USA for      6 approximately how long?</p> <p>7 A. Seven years. September 2004 through      8 December 31st of 2011.</p> <p>9 Q. And in that time, did a company retain you      10 to assess their existing CPSC compliance programs to      11 determine whether they were sufficient?</p> <p>12 A. Yes, both CPSC compliance programs and      13 other non-CPSC programs.</p> <p>14 Q. And what kind of regulatory standards      15 would you use in assessing their compliance programs?</p> <p>16 MR. MULLIN: Object to the form of the      17 question.</p> <p>18 THE WITNESS: What do you mean by      19 regulatory standards?</p> <p>20 BY MR. ROSS:</p> <p>21 Q. Well, you wrote, "federal agency      22 regulatory requirements," so why don't we phrase it</p>

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<p>1       that way.</p> <p>2           What federal agency regulatory</p> <p>3        requirements did you take into account in assessing</p> <p>4        the company's compliance programs?</p> <p>5        A. In the case of CPSC, we would look at the</p> <p>6        statute and the interpretative regulation, and in the</p> <p>7        case of NHTSA, we would look at NHTSA's reporting</p> <p>8        requirements. In the case of Food &amp; Drug</p> <p>9        Administration, we would look at their requirements</p> <p>10      for reporting or conducting recalls for products like</p> <p>11      medical devices or foods.</p> <p>12      Q. And what kind of industry voluntary</p> <p>13      standards would you assess during that process?</p> <p>14      A. We would look at what voluntary standard</p> <p>15      applicable to the products that the company produced</p> <p>16      were in existence.</p> <p>17      Q. Are you talking about manufacturing</p> <p>18      standards?</p> <p>19      A. Yes. It would be things like UL</p> <p>20      standards. We had people in the group who were</p> <p>21      expert in ISO standards. And we typically get a list</p> <p>22      from the manufacturers or the company who we were</p>	<p>1        Q. So typically when you would go -- again,</p> <p>2        we're talking about your time at Marsh -- when you</p> <p>3        would go and assess a company's compliance programs</p> <p>4        for CPSC, what kind of review would that entail?</p> <p>5        A. It could entail going into the facility</p> <p>6        and talking to key employees, key executives who had</p> <p>7        responsibility in different product areas. In other</p> <p>8        cases it might be doing phone interviews with</p> <p>9        individuals within the company and then looking at</p> <p>10      their existing documents to see what they said.</p> <p>11      Q. And what kind of existing documents would</p> <p>12      you review?</p> <p>13      A. Any documents that they had in place that</p> <p>14      dealt with how they evaluated safety of products. So</p> <p>15      we would look at things like consumer complaints or</p> <p>16      how they maintained or collected information about</p> <p>17      consumer complaints, incident reports, call center</p> <p>18      information, quality control information, how they</p> <p>19      collected this information, whether they maintained</p> <p>20      it in a central database, for example, whether they</p> <p>21      had a committee that evaluated this information</p> <p>22      routinely, periodically, whether they had persons who</p>
<p style="text-align: center;">Page 47</p> <p>1       evaluating, we would ask them to provide us with a</p> <p>2       list of the -- what they knew to be -- what they</p> <p>3       believed to be the applicable voluntary or mandatory</p> <p>4       standards for their products.</p> <p>5       Q. So when you were doing this kind of</p> <p>6       assessment, you were part of a team at Marsh that</p> <p>7       would go meet with the client and assess their</p> <p>8       programs?</p> <p>9       A. Yes. Sometimes it was the team and</p> <p>10      sometimes it would just be myself.</p> <p>11      Q. And do you consider yourself to be a</p> <p>12      subject matter expert on industry voluntary standards</p> <p>13      for manufacturing small appliances?</p> <p>14      A. Not particularly. I couldn't be able to</p> <p>15      tell a company how to manufacture a product. I could</p> <p>16      work with them on identifying voluntary standards</p> <p>17      that might exist for a product. We would do that by</p> <p>18      going to test labs and ask them to identify the</p> <p>19      voluntary standards that exist.</p> <p>20      Q. Did you do that in this case?</p> <p>21      A. No. I wasn't asked to identify voluntary</p> <p>22      standards that might be applicable to these products.</p>	<p style="text-align: center;">Page 49</p> <p>1       were responsible for making decisions on whether</p> <p>2       there was a reporting obligation, whether they had an</p> <p>3       escalation procedure within the company to get a</p> <p>4       complaint that might go into a call center to</p> <p>5       somebody at a higher level who would be deciding</p> <p>6       whether to report to a regulatory agency.</p> <p>7       Q. Would you help assess companies' training</p> <p>8       programs to ensure that they could carry out these</p> <p>9       duties sufficiently?</p> <p>10      A. I don't recall we assessed existing</p> <p>11      training programs but we would inform companies that</p> <p>12      they needed to have training programs in place to</p> <p>13      train their employees on what to do and how to do it,</p> <p>14      and then we would sometimes go in to a company and do</p> <p>15      a training program by having different scenarios that</p> <p>16      we would throw out. And the way we would do it is</p> <p>17      you might have 30-40 people in the room, you would</p> <p>18      put them five or six people at a table, you would</p> <p>19      throw out different scenarios and then you would ask</p> <p>20      the people sitting around the tables to give their</p> <p>21      opinions on what they would do if faced with a</p> <p>22      particular product scenario. And then we would use</p>

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<p>1       that, tie that back to the compliance program that      2       they had in existence, make sure that they were doing      3       what their compliance program said they should do or      4       training them on how to function under their      5       compliance program.</p> <p>6       Q. Because a compliance program, when you're      7       talking about a big company like Spectrum, it's a      8       fairly broad term, right?</p> <p>9       A. I suppose so.</p> <p>10      Q. Well, it involved numerous different      11     functions and features within an organization to      12     ensure that they can meet their CPSC requirements,      13     right?</p> <p>14      A. Yes, but what we would do with some      15     companies, you might have a very big company and they      16     would have different divisions within the company.      17     And we would typically go into a particular division      18     and work with them on a compliance program, and then      19     tell the parent company that you should have similar      20     programs, not necessarily identical but similar or      21     close to identical programs in each of your other      22     subdivisions so that the company as a whole is</p>	<p>1       product -- I was burned or this product seems      2       dangerous or I thought that it wasn't safe, you      3       collect that information and then you may need to      4       bring in an engineer in to evaluate the product to      5       see what was going on, why the consumer was making      6       that complaint, whether there was something going on      7       with the product that might present some risk.</p> <p>8       Q. My point is that throughout this      9       process -- and please tell me if you disagree with      10      me. Throughout the process that starts with      11      designing a product and ends with monitoring products      12      that are being used in the field, there are many      13      points in that chain where people need training and      14      specialized knowledge in order to do their jobs?</p> <p>15      A. That sounds reasonable.</p> <p>16      Q. And you agree it's important that though      17      consumers may not have that specialized knowledge, if      18      they say things like this product is defective, this      19      product is dangerous, this product is a burn hazard,      20      that the company should take that seriously and      21      evaluate it, right?</p> <p>22      A. Yes.</p>
Page 51	Page 53
<p>1       operating in the same consistent manner.</p> <p>2       Q. You're talking about training in      3       particular. When you talked about having these      4       meetings with 30 to 40 people and throwing out      5       scenarios, that's to ensure that people knew how to      6       do the jobs that they were assigned, right?</p> <p>7       A. Right. And I would consider that to be a      8       training program.</p> <p>9       Q. Me too. And that's important because      10      things like quality systems, process validation,      11      complaint handling, people aren't born with innate      12      knowledge of how to do these things, are they?</p> <p>13      A. No, and that's why you have a manual and      14      you have training programs to explain to people what      15      to do and how to do it.</p> <p>16      Q. And when you're talking about small      17      appliances, you might have features that present      18      hazards that only an engineer might be able to      19      identify, right?</p> <p>20      A. Maybe for specific features but a call      21      center employee can listen for key words, for      22      example. If the consumer calls in and says the</p>	<p>1       Q. Now, Spectrum in particular is a fairly      2       large company, right?</p> <p>3       A. That's my understanding, yes.</p> <p>4       Q. Well, I looked this up yesterday and it      5       appears to be almost a \$7 billion company with 12,000      6       employees, right?</p> <p>7       A. I haven't looked at them.</p> <p>8       Q. Well, it's a very large consumer appliance      9       manufacturer, right?</p> <p>10      A. I'll not disagree with you.</p> <p>11      Q. It probably has a fairly expansive system      12      in place starting from designing products to      13      monitoring them in the field to ensure that safe      14      products are in consumers' hands, right?</p> <p>15      A. That's what companies typically do, yes.</p> <p>16      Q. That's what your testimony is at least? I      17      don't want to mischaracterize it.</p> <p>18      A. Well, my testimony is that Spectrum has      19      procedures in place so that it can determine whether      20      it has a reporting obligation to CPSC.</p> <p>21      Q. Just so I'm clear about that, is your      22      opinion limited to Spectrum actually has these</p>

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<p>1 programs in place or are you opining that they 2 actually function the way they're supposed to? 3       A. I'm saying that they have procedures in 4 place. 5       Q. You're saying that the procedures as they 6 exist in the various documents that you reviewed 7 appear to be reasonable, right? 8       A. In the documents that I reviewed and in 9 the interviews that I conducted with Nigel Stamp, 10 their procedures appear to be reasonable and designed 11 to collect information that can be evaluated to 12 determine whether a report to CPSC is appropriate. 13       Q. Would you please turn to page 17 of your 14 report? Under section 7 which says, "Spectrum's 15 internal reporting processes and procedures," the 16 first sentence, you note that you reviewed the 17 referenced documents and had discussions with Nigel 18 Stamp, Spectrum's senior director of global quality 19 and regulatory, right? 20       A. Yes. 21       Q. And are the documents you're referring to 22 the ones that are listed in Attachment 1?</p>	<p>1 discuss Spectrum's compliance program? 2       A. I didn't meet with him in person. It was 3 a telephone conferences. 4       Q. Approximately how many conferences? 5       A. Two. 6       Q. And how long did those last? 7       A. An hour, hour and a half each. 8       Q. And other than reviewing the documents on 9 page 2 of Attachment 1 and these two calls with 10 Mr. Stamp, did you do anything else to gather 11 information about Spectrum's compliance programs? 12       A. No. 13       Q. So the entirety of your opinion is based 14 off of that subset of information? 15       A. Yes. 16       Q. Had you met Mr. Stamp before this case? 17       A. No. And I still haven't met him except by 18 phone. 19       Q. Well, did you know him other than through 20 your employment in this case as an expert? 21       A. No. 22       Q. Now, based on your review again, you</p>
<p>1       A. Yes, Attachment 1 to -- yes. 2       Q. Now, with respect to Spectrum's compliance 3 programs, is the material that you considered the 4 material that's on page 2 of Attachment 1 that starts 5 with deposition of Nigel Stamp? 6       A. Yes. 7       Q. And do you recall how much of Mr. Stamp's 8 deposition pertained to the company's current 9 compliance program? 10      A. I don't recall specifically how much. 11      Q. A lot or a little? 12      A. I don't remember. 13      Q. And the sum total of the other documents 14 that you reference here, about 57 pages of documents, 15 right? 16      A. I don't think they were that many. 17      Q. Not 57 total documents. 57 pages. 18      A. Yeah, I don't remember that it was 19 57 pages but I didn't count. 20      Q. Well, it wasn't hundreds, right? 21      A. No. 22      Q. When did you meet with Mr. Stamp to</p>	<p>1 conclude that Spectrum has reasonable internal 2 processes and procedures to collect and evaluate 3 information on the safety of its products, right? 4       A. Yes. 5       Q. Now, when it says processes and procedures 6 to collect and evaluate information relating to the 7 safety of its products, are you really referring to 8 the process for assessing and obtaining consumer 9 complaints and escalating them through the company? 10      A. Yes, as a part of it. 11      Q. Are you familiar with a CPSC publication 12 that talks about good manufacturing practices? 13      A. Generally, yes. 14      Q. Well, it's a publication that the CPSC has 15 released since the late '70s, right? 16      A. Right. 17      Q. So it's been out there for quite some 18 time, what the CPSC thinks pertains to safety with 19 respect to manufacturing processes, right? 20      A. Right. 21      Q. And at least in that booklet, the issues 22 that the CPSC identifies are much more</p>

<p style="text-align: center;">Page 58</p> <p>1 all-encompassing than the scope of your report, 2 right?</p> <p>3 A. I don't recall specifically what's in the 4 manufacturing guide but I know it's fairly detailed.</p> <p>5 Q. Well, you don't discuss --</p> <p>6 A. But that -- I'm sorry.</p> <p>7 Q. Do you discuss or consider how Spectrum 8 obtains raw materials for its products?</p> <p>9 A. No. I didn't go into a deep dive with 10 Spectrum on how it qualifies -- how it sources 11 materials, for example. I wasn't focused on that. I 12 was focused on information that Spectrum collects, 13 obtains, receives that pertain to product risk, 14 product safety and how it uses that information to 15 determine whether it has an obligation to report to 16 CPSC.</p> <p>17 Q. What I'm trying to differentiate so that 18 we can steer the discussion in the right direction is 19 between how Spectrum obtains information and 20 addresses safety issues that arise when the products 21 are in consumers' hands versus how Spectrum prevents 22 unsafe products from going into commerce in the first</p>	<p style="text-align: center;">Page 60</p> <p>1 Q. So in order to obtain sufficient 2 information to prevent unsafe products from getting 3 into the marketplace in the first place, a company's 4 compliance programs need to actually address the 5 process by which products go into the marketplace, is 6 that right?</p> <p>7 A. Companies should have procedures in place 8 to design safety into their product as the products 9 are being manufactured. And I didn't evaluate 10 whether Spectrum has such procedures in place.</p> <p>11 Q. So before we get into the specifics of 12 what you did, even if a company has a pristine 13 process in place for addressing consumer complaints, 14 if it is deficient in how it evaluates and prevents 15 unsafe products from getting into the marketplace in 16 the first place, can you say that that compliance 17 program is sufficient to allow the company to comply 18 with the reporting requirements of the CPSA?</p> <p>19 A. In a broad sense, yes, because companies 20 produce products taking safety into account and they 21 design safe products, what they believe to be safe 22 products or reasonably safe products and then things</p>
<p style="text-align: center;">Page 59</p> <p>1 place. Do you understand that distinction?</p> <p>2 A. Yes. And I didn't look at the latter. I 3 didn't look at how they design their products in the 4 first instance, I didn't look at how they manufacture 5 their products.</p> <p>6 Q. Now, we'll get into more detail into this 7 later, but when we're talking about the reporting 8 requirement, is the purpose of the reporting 9 requirement to prevent unsafe products from getting 10 into consumers' hands or to simply address dangerous 11 products after they've already injured people?</p> <p>12 A. Well, it can be both because if a company 13 is engaged in continuous improvement, for example, 14 and its engineers identify a safety problem with a 15 product that could present a substantial risk of 16 injury to the public, to consumers, then that would 17 trigger a reporting obligation.</p> <p>18 So it doesn't have to be only after 19 products are in the marketplace. Companies routinely 20 are continuously evaluating their products. It might 21 be based on consumer complaints but doesn't have to 22 be.</p>	<p style="text-align: center;">Page 61</p> <p>1 happen in the marketplace that they just don't -- 2 didn't anticipate would happen. But companies 3 should, in manufacturing products, should design 4 safety into the product. They should be doing 5 regular testing and evaluation of their products 6 before they're put into the marketplace. And if 7 things happen when the product is in the marketplace, 8 then that's information that you need to evaluate to 9 determine whether, for example, you have a reporting 10 obligation to a regulatory agency.</p> <p>11 Q. So you're saying companies should have a 12 program in place to ensure the safety of products 13 before they go out the door, right?</p> <p>14 A. Yes. You design safety into products. 15 And that's what I think that the CPSC's manufacturing 16 guide addresses.</p> <p>17 Q. But that's not the subject of your 18 testimony here?</p> <p>19 A. That's correct.</p> <p>20 Q. And I'm just trying to clarify what we're 21 talking about. You don't actually know about that 22 first half of the process, the premarket process that</p>

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<p>1 spectrum goes through to ensure that its products are 2 safe, right?</p> <p>3 A. That's correct.</p> <p>4 Q. And if it turned out that that process was 5 woefully deficient, even if the consumer complaint 6 side was pristine, would that change your ultimate 7 opinion on the sufficiency of Spectrum's compliance 8 programs?</p> <p>9 A. It might.</p> <p>10 Q. So without further information, you can't 11 say for sure at all that their compliance programs 12 are sufficient, can you?</p> <p>13 A. Well, I can -- within the scope of what I 14 was evaluating, I can, yes.</p> <p>15 Q. So you can say this part of the program is 16 reasonable, that's what you're saying?</p> <p>17 A. Yes.</p> <p>18 Q. But without knowing the other parts, you 19 can't be sure that Spectrum actually does have 20 sufficient programs in total to comply with the 21 CPSA's reporting requirement, right?</p> <p>22 A. Right. My report only talks about the</p>	<p>1 Applica/Spectrum proactively reported coffee maker 2 issues to CPSC on at least four different occasions, 3 including the instant case. And then you mention the 4 two PI cases where staff closed the investigations, 5 right?</p> <p>6 A. What page are you reading from?</p> <p>7 Q. 17, bottom of page 17.</p> <p>8 A. Okay.</p> <p>9 Q. The question I have is, what is the 10 relevance of these Applica cases in your mind to 11 whether Spectrum has sufficient compliance programs 12 today?</p> <p>13 A. I think the programs that they have today, 14 I suspect, build on programs that they had in place 15 in the past. My only point was to show that Spectrum 16 has reported to CPSC in the past. But I didn't 17 evaluate their programs in the past. I only 18 evaluated their current program.</p> <p>19 Q. Do you know how many of these six cases 20 arose at a time when Spectrum even owned Applica?</p> <p>21 A. No.</p> <p>22 Q. Well, let's see --</p>
<p style="text-align: center;">Page 63</p> <p>1 area of Spectrum's program that I looked at and my 2 conclusions are based on the portions of the Spectrum 3 program that I looked at.</p> <p>4 MR. MULLIN: Good time for a break or no?</p> <p>5 MR. ROSS: I have a couple more questions 6 on this line and then I'll have a new line so --</p> <p>7 MR. MULLIN: Sure.</p> <p>8 MR. ROSS: If you don't mind.</p> <p>9 MR. MULLIN: No, that's fine.</p> <p>10 BY MR. ROSS:</p> <p>11 Q. Now, let's talk for a minute about these 12 other Applica/Spectrum CPSC cases that you mentioned 13 below. Do you know what I'm talking about here?</p> <p>14 A. Yes, the one ending in 23 and 25?</p> <p>15 Q. Well, the two PI cases plus the four cases 16 that you say Spectrum proactively reported, right?</p> <p>17 A. Yes. So we're getting away from this part 18 of the report now?</p> <p>19 Q. No.</p> <p>20 A. Or you're going to tie it in?</p> <p>21 Q. I think it ties in. You state here that 22 documents I reviewed show that since 2005,</p>	<p style="text-align: center;">Page 65</p> <p>1 A. It may not be any. It may be a few.</p> <p>2 Q. Well, the two PI cases were both prior to 3 June 2010 when Spectrum bought Applica, right?</p> <p>4 A. That sounds right, yes.</p> <p>5 Q. So I assume you're not saying that Applica 6 and Spectrum had the same kind of reporting systems 7 at that time, right?</p> <p>8 A. Yeah, because I don't know what exactly 9 they had in place at that time.</p> <p>10 Q. Right, because that wasn't part of your 11 review?</p> <p>12 A. Right. I was just making the point that 13 they did report in those four cases.</p> <p>14 Q. And in those four cases, they were Fast 15 Track cases, right?</p> <p>16 A. That's correct.</p> <p>17 Q. So there was no finding by staff of a 18 substantial product hazard one way or the other, 19 right?</p> <p>20 A. Right.</p> <p>21 Q. And do you know whether Spectrum today has 22 any of the same personnel in its compliance programs</p>

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<p>1 at Applica at that time?</p> <p>2 A. I don't recall. There may be something in</p> <p>3 Nigel Stamp's deposition but I don't recall.</p> <p>4 Q. So you don't know if they had the same</p> <p>5 personnel and you don't know if they had the same</p> <p>6 kind of systems and programs that Spectrum has today,</p> <p>7 right?</p> <p>8 A. Right.</p> <p>9 Q. So can you say with any certainty that the</p> <p>10 fact that Applica reported cases before Spectrum even</p> <p>11 owned it shows that Spectrum has a commitment to</p> <p>12 compliance?</p> <p>13 A. Well, there was some overlap because Nigel</p> <p>14 Stamp got there in I think it was 2010, and in his</p> <p>15 deposition, he talked about -- he used terms that are</p> <p>16 similar to what's done today. He talked about the</p> <p>17 weekly meetings and the quality reports. And in</p> <p>18 fact, what he told me is that the report is still</p> <p>19 known today -- the daily report that he gets is still</p> <p>20 known as the Applica quality report. They never</p> <p>21 changed the name. It's essentially the same report</p> <p>22 so he's getting the same information or same type of</p>	<p>1 right?</p> <p>2 A. He signed the second one, I think, the</p> <p>3 supplemental report. The first one was signed by a</p> <p>4 lawyer and then he signed a supplemental document.</p> <p>5 That's my recollection.</p> <p>6 Q. And was he the head of quality at that</p> <p>7 time?</p> <p>8 A. I believe so.</p> <p>9 Q. So is it your understanding that he has a</p> <p>10 materially different role today than he did in April</p> <p>11 of 2012?</p> <p>12 A. I don't think it's different but --</p> <p>13 Q. And --</p> <p>14 A. I just remember from the deposition that</p> <p>15 there was a transition period in there where he was</p> <p>16 taking over from somebody else when he was in Florida</p> <p>17 and he wasn't making the decisions at the time and I</p> <p>18 don't recall the breakdown of the dates when he</p> <p>19 specifically then assumed complete responsibility.</p> <p>20 Q. And again, you didn't assess whether these</p> <p>21 programs actually function in practice the way</p> <p>22 they're supposed to on paper, right?</p>
<p style="text-align: center;">Page 67</p> <p>1 information, presumably, that he got when Spectrum</p> <p>2 didn't own Applica.</p> <p>3 Q. So it's your understanding that Applica,</p> <p>4 six or seven years ago, has similar or had similar</p> <p>5 compliance programs to what Spectrum has today?</p> <p>6 A. I can't say how similar they were. They</p> <p>7 had some kind of programs in place.</p> <p>8 Q. So you can't really draw a conclusion one</p> <p>9 way or the other as to whether Spectrum has better or</p> <p>10 worse programs than Applica did, right?</p> <p>11 A. I didn't try to compare Spectrum programs</p> <p>12 with Applica programs.</p> <p>13 Q. Just a final question or two and then we</p> <p>14 can break. Mr. Stamp was at the company when it</p> <p>15 reported the instant case, right?</p> <p>16 A. I believe so.</p> <p>17 Q. And do you know what Mr. Stamp's</p> <p>18 involvement was in the reporting process at that</p> <p>19 time?</p> <p>20 A. I don't recall specifically. I don't</p> <p>21 think he was directly involved but I don't recall.</p> <p>22 Q. Well, he signed the Section 15 report,</p>	<p style="text-align: center;">Page 69</p> <p>1 A. Right. I looked at the programs that they</p> <p>2 have and not how they were actually functioning,</p> <p>3 other than to the extent to which Nigel Stamp</p> <p>4 explained to me how the programs function.</p> <p>5 Q. And if the Court in this case were to find</p> <p>6 that quality did not do its job in assuring that</p> <p>7 information was considered and ultimately reported in</p> <p>8 the instant case, could that have personal</p> <p>9 ramifications for Mr. Stamp?</p> <p>10 A. I don't know.</p> <p>11 Q. Does Mr. Stamp have a personal stake in</p> <p>12 the outcome of this case?</p> <p>13 A. I don't know.</p> <p>14 Q. If the Court determines that Mr. Stamp did</p> <p>15 not do his job in April 2012, do you think that could</p> <p>16 make him look pretty bad?</p> <p>17 MR. MULLIN: Object to the form of the</p> <p>18 question. You can answer.</p> <p>19 THE WITNESS: It depends on what his job</p> <p>20 was, what his responsibility was.</p> <p>21 BY MR. ROSS:</p> <p>22 Q. Well, you just testified that you thought</p>

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<p>1 his responsibility was pretty much the same then as 2 it is today, right?</p> <p>3 A. I think I said -- and if I didn't, I 4 should have said I don't know exactly what his 5 responsibility was then, that there was some 6 transition period and I don't recall the dates when 7 he became more fully involved in the process. And 8 I'm not sure what his role is in terms of designing 9 products, if any.</p> <p>10 Q. So whether or not the Court finds that 11 Spectrum violated its reporting obligation you don't 12 think would affect Mr. Stamp at all?</p> <p>13 A. It may not because Mr. Stamp's 14 responsibility is to collect information relevant 15 to -- as I understand it, relevant to -- information 16 that's relevant to whether there is a safety problem 17 with a product and then to escalate that information 18 within the company where it ultimately goes to the 19 legal office, who makes a decision on whether there 20 is a reporting obligation. And I identify in my 21 report the information that I understand that Nigel 22 Stamp's group takes into consideration and escalates</p>	<p>1 even get to the emails and letters, you talk about 2 written quality reports, right?</p> <p>3 A. Show me where you're --</p> <p>4 Q. The first paragraph under call center on 5 page 18.</p> <p>6 A. Okay. Yes.</p> <p>7 Q. Now, in connection with your analysis, did 8 you review any quality reports?</p> <p>9 A. I may have seen one in an exhibit to a 10 deposition but not specifically, no.</p> <p>11 Q. Was that a current quality report or 12 historical one?</p> <p>13 A. It was probably an historical one.</p> <p>14 Q. Do you know whether in fact the quality 15 reports at Spectrum contained the information that 16 you say they contain here?</p> <p>17 A. I based what I said that they contain on 18 my discussions with Nigel Stamp.</p> <p>19 Q. The next few paragraphs here talk about 20 keyword searches and product retrievals, right?</p> <p>21 A. Yes.</p> <p>22 Q. And that's what we were talking about</p>
<p>within the company.</p> <p>MR. ROSS: We can take a break now. Off the record, please.</p> <p>(Recess.)</p> <p>BY MR. ROSS:</p> <p>Q. Mr. Schoem, now that we're back from a break, I would like to just discuss some of the various aspects of Spectrum's compliance programs that you discuss in your report. Now, one of the things you talk about is Spectrum's call center, right?</p> <p>A. Yes.</p> <p>Q. And that's obviously a critical component of finding out about product failures in the field, right?</p> <p>A. That's one component, yes.</p> <p>Q. Well, if you don't have a number for consumers to call, it's kind of hard for them to complain to you, right?</p> <p>A. They seem to do it by email and a few apparently actually write letters.</p> <p>Q. Well, the first paragraph here, before we</p>	<p>earlier about how customer service agents are trained to identify particular keywords that they can escalate it to people at the company who might be able to do something about it, right?</p> <p>A. Yes.</p> <p>Q. Now, sitting here today, do you know whether in fact consumer call center agents are trained to listen for keywords?</p> <p>A. Well, they have a document that lists the keywords and I'm told that they are told to listen for these keywords and if they have them, then they're supposed to retrieve -- attempt to retrieve the product from the consumer who is complaining about the product.</p> <p>Q. As part of your investigation, did you interview any call center employees?</p> <p>A. No, I didn't.</p> <p>Q. Did you interview any PI specialists?</p> <p>A. No. The only person I interviewed was Nigel Stamp.</p> <p>Q. Did you review any data that verifies that the company received 25 to 30 percent of its returns</p>

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<p>1       that it requests?</p> <p>2       A. No. All the information in this report is 3       based on the documents that I reviewed and on the two 4       interviews with Nigel Stamp.</p> <p>5       Q. Now, next here you say that Spectrum 6       evaluates the products after they're received, right?</p> <p>7       A. Yes.</p> <p>8       Q. How does that entail?</p> <p>9       A. What Mr. Stamp advised, and there is a 10      chart that kind of shows this, is the product comes 11      back and it goes to an engineer who is within 12      Mr. Stamp's department or division. The engineers, 13      as they evaluate the product, are trying to verify 14      whether what the consumer said happened, happened or 15      could have happened.</p> <p>16      So they do a technical evaluation of the 17      product and then write a report. The report is then 18      reviewed by various people within the company with 19      responsibility in that area and then a final report 20      is written and that's provided to Mr. Stamp.</p> <p>21      Q. As part of your investigation, did you 22      review any engineering analyses?</p>	<p>1       MR. MULLIN: Object to the form of the 2       question.</p> <p>3       THE WITNESS: Employees in a call center 4       don't necessarily have to be trained on CPSC 5       reporting obligations and reporting requirements. 6       What they have to be trained on is, if a consumer 7       complains about a product safety-related issue, you 8       need to document that, you need to record it.</p> <p>9       They have quality issues and product 10      incident issues. They have two types of tracking, I 11      guess you could call it. If there is a consumer 12      complaint about an injury, that is supposed to be 13      escalated to a specialist. If it's a potential 14      injury, then that's handled by the call center.</p> <p>15      So whether it's important for call center 16      employees to know about reporting obligations, maybe 17      in a general sense, but what they have to be trained 18      on is if you obtain information that's 19      safety-related, you need to document, here's this 20      procedure that you go through.</p> <p>21      Q. I'm not actually talking about training on 22      what the CPSC reporting obligation is. What I'm</p>
<p>1       A. No.</p> <p>2       Q. Did you speak with any staff responsible 3       for evaluating products that are returned by 4       consumers?</p> <p>5       A. As I said, the only person I talked to is 6       Nigel Stamp.</p> <p>7       Q. Did you inquire into the training that 8       Spectrum provides to ensure that employees know how 9       to do their jobs?</p> <p>10      A. No, I didn't.</p> <p>11      Q. Do you know whether in fact Spectrum 12      provides any training at all to its employees?</p> <p>13      A. My recollection is Nigel Stamp told me 14      that employees are trained but I don't know the 15      extent to which they're trained and what that 16      entails.</p> <p>17      Q. If I told you that Nigel Stamp had signed 18      an interrogatory under penalty of perjury in this 19      case stating that they do not in fact train employees 20      with regard to anything dealing with CPSC compliance, 21      would that change your opinion on the reasonableness 22      of Spectrum's compliance programs?</p>	<p>1       saying is if you were to learn that throughout this 2       entire process from gathering complaints to 3       retrieving products to evaluating them, the whole 4       process that you described, that not a single one of 5       these employees is trained, would that impact your 6       opinion on whether this compliance program is 7       reasonable?</p> <p>8       MR. MULLIN: Object to the form of the 9       question.</p> <p>10      THE WITNESS: Not trained on what? 11      BY MR. ROSS:</p> <p>12      Q. How to do their jobs at all.</p> <p>13      MR. MULLIN: Object to the form of the 14      question. You can answer.</p> <p>15      THE WITNESS: I just find it hard to 16      believe that they're not trained to some extent. If 17      they're given a document that says, look for these 18      keywords and if they're told to record this 19      information in their data systems, then that's what I 20      understand that they did.</p> <p>21      I don't know what Mr. Stamp said in the 22      interrogatory. I didn't read that.</p>

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<p>1 BY MR. ROSS:</p> <p>2 Q. Well, we're talking about the entire</p> <p>3 compliance program that you're talking about here</p> <p>4 now, not just the call center employees.</p> <p>5 Now, you testified earlier that training</p> <p>6 is an important part of ensuring compliance, right?</p> <p>7 A. Yes, I said that employees should be</p> <p>8 trained on their responsibilities.</p> <p>9 Q. And we talked about how people aren't</p> <p>10 necessarily born with innate knowledge of how to do</p> <p>11 all the things that's necessary to ensure that</p> <p>12 dangerous products are kept away from consumers,</p> <p>13 right?</p> <p>14 A. That's right.</p> <p>15 Q. So if Spectrum doesn't in fact train any</p> <p>16 of its employees how to do those things, can they</p> <p>17 possibly have a reasonable compliance program?</p> <p>18 MR. MULLIN: Object to the form of the</p> <p>19 question.</p> <p>20 THE WITNESS: I think that could be a</p> <p>21 weakness. If they're not -- you have to have a</p> <p>22 program in place. You have to train your employees</p>	<p>1 A. No.</p> <p>2 Q. You use various terms here for when</p> <p>3 certain individuals participate in the meeting. What</p> <p>4 does generally participate mean?</p> <p>5 A. Where are you reading so I can see exactly</p> <p>6 what I said?</p> <p>7 Q. Well, "The Home Global Quality members who</p> <p>8 generally participate in the meeting." It's the</p> <p>9 first sentence.</p> <p>10 A. They don't all necessarily attend every</p> <p>11 meeting. It is my understanding from Mr. Stamp some</p> <p>12 participate in person, some participate by phone. He</p> <p>13 doesn't necessarily attend every meeting. He might</p> <p>14 have a delegate at the meeting acting on his behalf,</p> <p>15 so I used the term generally.</p> <p>16 Q. When is it appropriate for Mr. Stamp to</p> <p>17 attend a meeting? Again I'm using your words.</p> <p>18 A. He didn't say. He just said that he</p> <p>19 attends -- I mean, my impression was when there are</p> <p>20 really important, key issues that are being</p> <p>21 discussed, he would try to participate either in</p> <p>22 person or by phone but he travels a lot. So it's</p>
<p style="text-align: center;">Page 79</p> <p>1 on how to follow that program. You have to train</p> <p>2 them on what their duties and responsibilities are.</p> <p>3 And that can be as simple as a new</p> <p>4 employee comes in and you say here's your manual and</p> <p>5 here's your duties and responsibilities and here's</p> <p>6 your supervisor, if you have any questions, go ahead</p> <p>7 and do it. I smile because I recall the depositions</p> <p>8 of some of the compliance officers and they said they</p> <p>9 had no training, it was just kind of on the job,</p> <p>10 learn how to do it and talk to your supervisors.</p> <p>11 BY MR. ROSS:</p> <p>12 Q. We're going to talk about the CPSC in a</p> <p>13 few moments here. I'm talking about Spectrum for the</p> <p>14 time being. Now, you talk about quality meetings</p> <p>15 here, right?</p> <p>16 A. Where are you looking?</p> <p>17 Q. The last full paragraph on page 19. Do</p> <p>18 you see the paragraph?</p> <p>19 A. Yes.</p> <p>20 Q. Have you attended any quality meetings?</p> <p>21 A. At Spectrum?</p> <p>22 Q. Yes.</p>	<p style="text-align: center;">Page 81</p> <p>1 appropriate in part when he's available.</p> <p>2 Q. So you don't know how often any of these</p> <p>3 people actually attend these meetings, right?</p> <p>4 A. No. I know which entities are supposed to</p> <p>5 attend the meetings.</p> <p>6 Q. Do you know how long the meetings</p> <p>7 generally last?</p> <p>8 A. No, I don't.</p> <p>9 Q. Do you know how long they discuss any</p> <p>10 given quality or safety issue?</p> <p>11 A. No.</p> <p>12 Q. Do you know the kinds of quality or safety</p> <p>13 issues that are discussed other than what you state</p> <p>14 here?</p> <p>15 A. Not specifically, no.</p> <p>16 Q. Do you know if one of the kinds of safety</p> <p>17 or quality issues they might discuss is a coffee</p> <p>18 maker that could cause second degree burns?</p> <p>19 A. If they're getting a lot of complaints</p> <p>20 that are beyond what they would normally get, from my</p> <p>21 understanding they would discuss that. If there were</p> <p>22 injuries to consumers, they would discuss that or</p>

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<p>1 could discuss that.</p> <p>2 Q. As a general matter, whether or not you 3 think a company ultimately should report, would you 4 agree that it's important for the company to actually 5 consider safety issues so they can decide whether 6 reporting is appropriate?</p> <p>7 A. That's a key part of deciding whether you 8 have a reporting obligation, whether there is a 9 safety issue with the product as opposed to, say, a 10 quality issue.</p> <p>11 Q. Now, would you agree that hot coffee that 12 can cause serious burns is a potential safety issue?</p> <p>13 A. I think you asked that earlier and I said 14 it's possible.</p> <p>15 Q. That's why I used the word potential. 16 It's a possible safety issue, right?</p> <p>17 A. It's possible, yes.</p> <p>18 Q. Because it could cause serious injury to a 19 consumer?</p> <p>20 A. It's possible.</p> <p>21 Q. So whether or not you ultimately think the 22 company should report such an issue, you do think</p>	<p>1 Do you think that's reasonable?</p> <p>2 A. They can consider information without 3 meeting.</p> <p>4 Q. Do you know whether in fact the safety 5 committee in the instant case considered this issue 6 at all?</p> <p>7 A. I don't know.</p> <p>8 Q. Do you know if it was ever raised for 9 discussion?</p> <p>10 A. I don't know because I wasn't asked to 11 look at that.</p> <p>12 Q. The last paragraph on page 19, you start 13 talking about escalation to the legal department.</p> <p>14 A. Yes.</p> <p>15 Q. Do you see that? And you state that 16 quality considers certain information, evaluates 17 products, compares them to call center information 18 and a number of other things, right?</p> <p>19 A. Right.</p> <p>20 Q. So is this ultimately Mr. Stamp's 21 responsibility?</p> <p>22 A. Yes. That's what he advised me. It was</p>
<p style="text-align: center;">Page 83</p> <p>1 it's important that the decision makers get together 2 and actually evaluate information about the incidents 3 that they've received?</p> <p>4 A. Yes.</p> <p>5 Q. Do you know whether in the instant case 6 the decision makers ever got together to discuss 7 information about the coffee makers prior to March 8 2012?</p> <p>9 A. I don't know.</p> <p>10 Q. If I were to tell you that there is no 11 record whatsoever that the safety committee 12 responsible for reporting discussed this issue at all 13 over the first three years that they were receiving 14 incidents, would you consider that to be reasonable?</p> <p>15 MR. MULLIN: Object to the form of the 16 question.</p> <p>17 THE WITNESS: I don't know what they were 18 considering.</p> <p>19 BY MR. ROSS:</p> <p>20 Q. Well, I'm telling you to consider for 21 purposes of this question that they didn't meet at 22 all so they didn't consider anything for three years.</p>	<p style="text-align: center;">Page 85</p> <p>1 his responsibility to escalate it, except in the case 2 of product incidents where there is actually an 3 injury. And that's a separate track which goes right 4 up either to the business or even legal department.</p> <p>5 Q. But you would agree that a product can 6 present a risk of harm to a consumer even if an 7 injury hasn't occurred yet, right?</p> <p>8 A. Yes.</p> <p>9 Q. I mean, if a coffee maker was set on fire 10 and burned down an empty house, it's still a pretty 11 risky product, right?</p> <p>12 A. Right. And -- yes.</p> <p>13 Q. So if Mr. Stamp is ultimately responsible 14 for escalating issues that don't result in injury, 15 it's fairly important that he actually does what you 16 say he does, right?</p> <p>17 A. Yes, either he or a surrogate does that. 18 If he's not in attendance at the meeting and it's 19 something that needs to be escalated, then whoever 20 he's left as the responsible person, he's responsible 21 for escalating.</p> <p>22 Q. What kind of issues might Mr. Stamp</p>

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<p>1 escalate directly without having the kind of meeting 2 that you discuss here?</p> <p>3       A. He felt that when there was a really 4 critical safety issue, he didn't have to have a 5 meeting to escalate it to the next level.</p> <p>6       Q. Now, when you were having this discussion, 7 did Mr. Stamp give you specific examples of cases 8 that he's actually dealt with in real life?</p> <p>9       A. No.</p> <p>10      Q. So you didn't go back and try to connect 11 his decision making to see if you agreed with the way 12 he evaluated safety hazards, did you?</p> <p>13      A. No. He just told me the process that he 14 has in place and the steps that he takes and I 15 accepted what he said as to what he does.</p> <p>16      Q. And if any of the information that he 17 conveyed to you was incorrect, that could ultimately 18 change the opinions that you present in this report, 19 right?</p> <p>20      A. I don't know if I would say any 21 information but, yes, I do leave myself room to say 22 if new or different information becomes available, it</p>	<p>1 complaining about a product, they're not happy with 2 it, they're not satisfied with it and so they can do 3 a request for corrective action to address those 4 complaints that are coming in.</p> <p>5       Q. Now, when you were at Marsh and you were 6 doing evaluations of companies' compliance programs, 7 is one of the pieces of data that you would look at 8 information on the company's ability to identify and 9 resolve issues like this?</p> <p>10      A. Either that or we would tell them that 11 they need to have procedures in place so that they 12 can identify and resolve issues.</p> <p>13      Q. But again, having a procedure in place and 14 actually being able to identify and correct problems 15 are two distinct issues, right?</p> <p>16      A. They're distinct but interrelated. You 17 have to identify the problem to be able to fix it.</p> <p>18      Q. What I'm saying is, having a program in 19 place and actually executing that program the way 20 it's supposed to be are two separate issues, right?</p> <p>21      A. They're both important issues, separate 22 and important.</p>
<p style="text-align: center;">Page 87</p> <p>1 could result in my modifying or changing the report.</p> <p>2       Q. Down on page 20, you have one paragraph 3 under Requests for corrective action. Do you see 4 that?</p> <p>5       A. Yes.</p> <p>6       Q. And basically what you state here is that 7 Spectrum indeed has a process for requests for 8 corrective action?</p> <p>9       A. Yes.</p> <p>10      Q. And you talk about products going in the 11 wrong boxes. They know how to fix that, right?</p> <p>12      A. Right.</p> <p>13      Q. Do you know anything else about how this 14 process works?</p> <p>15      A. Not specifically. That was an example 16 that Mr. Stamp gave of a nonsafety issue that would 17 be dealt with simply.</p> <p>18      Q. So is that your answer?</p> <p>19      A. Yeah. As I say, that they can make a 20 request for corrective action based on consumer 21 complaints, quality issues. They may see information 22 that's reported on Amazon that consumers are</p>	<p style="text-align: center;">Page 89</p> <p>1       Q. You didn't interview anybody who deals 2 with requests for corrective action besides 3 Mr. Stamp, right?</p> <p>4       A. Correct.</p> <p>5       Q. And you didn't review any data about how 6 long it takes the company, for instance, to identify 7 root cause and actually correct problems with its 8 products?</p> <p>9       A. No. The impression that I had was when a 10 returned product comes in, the engineering evaluation 11 is not a lengthy process but I don't have any 12 specific information on the amount of time that would 13 be spent on it.</p> <p>14      Q. And the company's ability to identify or 15 cause and correct it in a timely fashion are sort of 16 important aspects of keeping unsafe products out of 17 consumers' hands, aren't they?</p> <p>18      A. Yes, I think so.</p> <p>19      Q. Now, the next paragraph here, you talk 20 about product holds, right?</p> <p>21      A. Yes.</p> <p>22      Q. And this is obviously critical to keeping</p>

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<p>1 unsafe products out of consumers' hands, right?</p> <p>2 A. Yes.</p> <p>3 Q. Because at the point where you've</p> <p>4 identified an unsafe product and put it on hold, you</p> <p>5 already know, presumably, about the risk, right?</p> <p>6 A. Presumably, or you might not know about</p> <p>7 the risk and you put it on hold until you can</p> <p>8 evaluate the risk.</p> <p>9 Q. Well, if you're concerned that a product</p> <p>10 might present a safety hazard, it's pretty important</p> <p>11 that you can put it on hold and keep it there, right?</p> <p>12 A. Yes.</p> <p>13 Q. And, Mr. Schoem, would you expect that a</p> <p>14 company would take reasonable precautions to ensure</p> <p>15 that product that's on hold in fact stays on hold?</p> <p>16 A. Reasonable precautions, yes. But we're</p> <p>17 all human.</p> <p>18 Q. Might a reasonable precaution include some</p> <p>19 sort of monitoring of a product on hold?</p> <p>20 A. Might.</p> <p>21 Q. Might reasonable precautions include</p> <p>22 having to find processes and procedures for handling</p>	<p>1 Q. Well, you reviewed a document called</p> <p>2 Spectrum Product Hold Process Chart, right?</p> <p>3 A. Yes, that's a document I --</p> <p>4 Q. And you reviewed the document entitled</p> <p>5 Spectrum Product Holds, WI-8-3-A Document Revision A,</p> <p>6 Effective July 20 of 2013, right?</p> <p>7 A. Yes.</p> <p>8 Q. Now, the latter document that I</p> <p>9 referenced, is that the actual SOP that Spectrum</p> <p>10 follows for product holds?</p> <p>11 A. That's the document that I was provided.</p> <p>12 That is the most current document that reflects what</p> <p>13 they do today.</p> <p>14 Q. Do you happen to know why that document</p> <p>15 was revised in July of 2013?</p> <p>16 A. No. And there was -- that may be the</p> <p>17 document that I looked at but I didn't see any</p> <p>18 difference between the earlier version and the</p> <p>19 revised version. I know there was one document in</p> <p>20 this file, and I don't recall specifically if it was</p> <p>21 that one, where I scratched my head and said, okay,</p> <p>22 they've got a revision but I don't know that there is</p>
<p>held products?</p> <p>A. Might.</p> <p>Q. Might reasonable people want to have</p> <p>defined processes for handling held products during a</p> <p>recall specifically?</p> <p>A. Might.</p> <p>Q. Now, you told me earlier that the sale of</p> <p>recalled coffee makers in this case was out of the</p> <p>realm of your testimony here, right?</p> <p>A. Right.</p> <p>Q. So you didn't review any documentation</p> <p>about that?</p> <p>A. No, other than the allegation in the</p> <p>complaint of the government.</p> <p>Q. Do you think the fact that the company</p> <p>sold recalled coffee makers is relevant to its</p> <p>product hold procedures?</p> <p>A. Well, relevant in terms of today, yes.</p> <p>Again, I didn't look at what was done then.</p> <p>Q. Well, you did review one product hold</p> <p>procedure, right?</p> <p>A. I read a document and talked to Mr. Stamp.</p>	<p>any changes. But I would have to look at the two</p> <p>documents to answer what the revision was.</p> <p>Q. Now, I know that you didn't, again, verify</p> <p>how these processes actually work in practice, but if</p> <p>I were to tell you that Spectrum concluded that it</p> <p>sold the recalled products in part because it lacked</p> <p>defined procedures for executing a recall from an</p> <p>operations standpoint, might that indicate a weakness</p> <p>in their product hold processes?</p> <p>MR. MULLIN: Object to the form of the</p> <p>question.</p> <p>THE WITNESS: When did they sell the</p> <p>recalled product?</p> <p>BY MR. ROSS:</p> <p>Q. June of 2013, approximately three weeks or</p> <p>so before -- it would be four weeks. I take that</p> <p>back. They discovered the issue approximately four</p> <p>weeks before they revised the product hold SOP.</p> <p>A. And your question is?</p> <p>Q. My question is, if Spectrum concluded that</p> <p>it lacked defined procedures for executing a recall</p> <p>from an operations standpoint, might that bear on the</p>

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<p>1 effectiveness of its product hold procedures?</p> <p>2 MR. MULLIN: Object to the form of the</p> <p>3 question.</p> <p>4 THE WITNESS: It might.</p> <p>5 BY MR. ROSS:</p> <p>6 Q. If Spectrum had concluded that it had</p> <p>7 failed to inform all of its customers about a product</p> <p>8 hold because it had an old distribution list, might</p> <p>9 that bear on the effectiveness of its product hold</p> <p>10 procedures?</p> <p>11 MR. MULLIN: Object to the form of the</p> <p>12 question.</p> <p>13 THE WITNESS: It might but I don't know</p> <p>14 the facts of what was happening then, so I'm just</p> <p>15 answering your "might" questions.</p> <p>16 BY MR. ROSS:</p> <p>17 Q. And that's all I'm asking. Now, if</p> <p>18 Spectrum fails to tell its warehouses when recalled</p> <p>19 products are being shipped there such that the</p> <p>20 products are never actually put on hold, does that</p> <p>21 bear on the reasonableness of a product hold</p> <p>22 procedure?</p>	<p>1 ensure that unsafe products are staying out of</p> <p>2 consumers' hands, can you?</p> <p>3 A. Not if reasonable processes and procedures</p> <p>4 that are in place aren't being followed. That would</p> <p>5 be a problem.</p> <p>6 Q. Now, the final thing that you address here</p> <p>7 is Spectrum's legal department, right?</p> <p>8 A. Right.</p> <p>9 Q. And that's at the bottom of page 20 going</p> <p>10 to 21?</p> <p>11 A. Yep.</p> <p>12 Q. And this is I think obviously an important</p> <p>13 part of the process because apparently legal here</p> <p>14 decides whether to report matters to the CPSC. Is</p> <p>15 that consistent with your understanding?</p> <p>16 A. Yes.</p> <p>17 Q. And you start this section with,</p> <p>18 "According to Mr. Stamp," correct?</p> <p>19 A. Yes.</p> <p>20 Q. So did you base anything in this</p> <p>21 particular portion of the summary on documents or</p> <p>22 data or did you entirely rely on what Mr. Stamp told</p>
<p>1 A. Say that again.</p> <p>2 Q. If Spectrum never tells its warehouses</p> <p>3 when recalled products are actually coming in the</p> <p>4 door, could that impact the effectiveness of a</p> <p>5 product hold procedure?</p> <p>6 MR. MULLIN: Object to the form of the</p> <p>7 question.</p> <p>8 THE WITNESS: I suppose it could.</p> <p>9 BY MR. ROSS:</p> <p>10 Q. Well, if they don't know that it should be</p> <p>11 put on hold and they put it into salable inventory,</p> <p>12 that's a problem, right?</p> <p>13 A. Could be.</p> <p>14 Q. And these are at least in a sense</p> <p>15 process-related problems, right?</p> <p>16 A. Could be process-related problems, could</p> <p>17 be human problems. Somebody could have been told and</p> <p>18 they didn't follow instructions. I just don't know.</p> <p>19 I don't know what was happening then.</p> <p>20 Q. And that's the important distinction here,</p> <p>21 right, is that you can have all these processes, but</p> <p>22 if people don't actually follow them, you can't</p>	<p>1 you?</p> <p>2 A. I entirely relied on what Mr. Stamp told</p> <p>3 me.</p> <p>4 Q. So you don't know in fact whether the</p> <p>5 legal department considers all the sources of</p> <p>6 information that are referenced in this paragraph?</p> <p>7 A. I only know what Mr. Stamp told me that</p> <p>8 they do.</p> <p>9 Q. Okay. So you can't sitting here today</p> <p>10 tell me whether any of this is actually true other</p> <p>11 than what Mr. Stamp told you?</p> <p>12 A. Other than what Mr. Stamp told me, that's</p> <p>13 correct.</p> <p>14 Q. Did you ever ask Mr. Stamp why Spectrum</p> <p>15 reported coffee makers when they did?</p> <p>16 A. No, I didn't.</p> <p>17 Q. So you don't actually know what sort of</p> <p>18 facts and information the company considered in</p> <p>19 deciding whether or not to report the coffee makers?</p> <p>20 A. You're talking about the four that they --</p> <p>21 I'm sorry, you're talking about this one?</p> <p>22 Q. I'm talking about the instant case.</p>

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<p>1        A. Yes, I was told -- I was told by Mr. Stamp      2 and it's in a document, it may have been in the full      3 report on this matter, that there was a class action      4 lawsuit that had been filed basically for economic      5 issues and Spectrum made a strategic decision to      6 report under Fast Track to CPSC so it could get rid      7 of the class action litigation and settle it as a      8 nuisance matter.</p> <p>9        Q. And that's in March 2012/April 2012 time      10 period, right?</p> <p>11      A. I believe so, yes. That was when the      12 report was made.</p> <p>13      Q. Did you ask Mr. Stamp about any other      14 high-level discussions about whether this should be      15 reported in, say, three and a half years prior to      16 that time period?</p> <p>17      A. No, I didn't.</p> <p>18      Q. Sitting here today, do you know what      19 information if any Spectrum considered or relied upon      20 in deciding whether or not to report?</p> <p>21      A. Well, I was told that -- again, I was told      22 that Spectrum relied on, among other things, previous</p>	<p>1        Q. Because if they didn't discuss it prior to      2 March 2012, they couldn't possibly have relied on      3 something, right?</p> <p>4            MR. MULLIN: Object to the form of the      5 question.</p> <p>6            THE WITNESS: They wouldn't necessarily      7 have to discuss it. I mean, if you've got somebody      8 who is responsible for reporting to CPSC and if in      9 fact they looked at previous decisions by the CPSC      10 that particular issues were not a substantial product      11 hazard, there might not be anything to discuss. It      12 would be, okay, the Commission has decided that hot      13 liquids from coffee makers contacting consumers isn't      14 a substantial product hazard, therefore perhaps there      15 is nothing to discuss.</p> <p>16           BY MR. ROSS:</p> <p>17      Q. So you don't actually know whether anybody      18 considered or discussed this issue in the legal      19 department prior to March 2012?</p> <p>20      A. All I can tell you is what Mr. Stamp      21 represented to me.</p> <p>22      Q. So --</p>
<p style="text-align: center;">Page 99</p> <p>1 interactions it had with CPSC, either as Spectrum or      2 Applica.</p> <p>3        Q. But sitting here today --</p> <p>4        A. But I don't know -- I wasn't privy to the      5 discussions that they had so I don't know exactly      6 what documents were discussed.</p> <p>7        Q. Well, you don't actually know that any      8 such discussions happened before March 2012, do you?</p> <p>9        A. No.</p> <p>10      Q. And if they had never considered this      11 issue at a high level prior to March 2012, how can      12 you say that they relied upon prior interaction with      13 the CPSC?</p> <p>14      A. Because I was told that the legal office,      15 among other things, considers previous interactions      16 that the company had with the Commission. So I'm      17 basing it on what I was told and what was represented      18 to me.</p> <p>19      Q. And that's assuming that the legal office      20 considered the issue of reporting prior to March 2012      21 at all, right?</p> <p>22      A. Right.</p>	<p style="text-align: center;">Page 101</p> <p>1        A. Is that information that the legal      2 division takes into account in deciding whether to      3 report includes previous interactions with the      4 Commission.</p> <p>5        Q. So that's no? Sitting here today, you      6 can't tell me when the company considered this issue      7 and when they supposedly relied on these prior      8 interactions prior to March 2012?</p> <p>9        A. The answer is no.</p> <p>10      Q. How does a company get rid of a class      11 action by reporting a case to the CPSC?</p> <p>12      A. I don't know what -- what I read was that      13 they resolved it by some type of a nuisance element,      14 that my impression was the class action had to do      15 with quality issues involving the product, I guess      16 with the carafe handle falling off. Consumers felt      17 that they weren't getting the value for their money      18 and rather than engaging in protracted -- my      19 impression from reading the document is rather than      20 engaging in protracted litigation in the class action      21 lawsuit, it was easier to report to the Commission      22 and do a recall of the products, and in that way</p>

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<p>1 getting rid of the class action. I don't know how      2 the class action was resolved other than what I read      3 that it was resolved for nuisance value.</p> <p>4 Q. So it's your understanding that the basis      5 of Spectrum's decision to report was that it would be      6 easier to recall 159,000 coffee makers over three and      7 a half years than to defend against what you say is a      8 meritless lawsuit?</p> <p>9 A. I don't know if it was easier and I don't      10 know if it was a meritless lawsuit. That's what was      11 represented in the documents that I read. And      12 somebody at Spectrum made the decision that to      13 resolve the class action lawsuit -- which, you know,      14 maybe that would have resulted in a recall anyway. I      15 don't know, if they had lost -- that they decided to      16 report to the Commission, that the documents indicate      17 they would not have otherwise reported to the      18 Commission this matter, but did so to resolve the      19 class action lawsuit.</p> <p>20 Q. Could the company have conducted a recall      21 without informing the CPSC?</p> <p>22 A. Well, companies do so at their peril. The</p>	<p>1 obligation to the CPSC." Did I read that correctly?      2 A. You did.      3 Q. And that's your conclusion, that      4 Spectrum's programs are reasonable?      5 A. The programs that I looked at -- perhaps I      6 should have qualified this. The programs that I      7 looked at -- the documents that I looked at and the      8 explanation that Mr. Stamp gave me tells me -- leads      9 me to conclude that they have reasonable procedures      10 in place to evaluate the information that I      11 identified that they evaluated and to determine      12 whether they have a reporting obligation to CPSC.      13 Q. In reaching that conclusion, you based      14 your analysis entirely on your interview with      15 Mr. Stamp and the documents you reviewed, correct?      16 A. Yes.      17 Q. You did not conduct any kind of      18 independent investigation to determine whether the      19 programs actually functioned that way in practice,      20 right?      21 A. That's correct.      22 Q. And in reaching that conclusion of</p>
<p style="text-align: center;">Page 103</p> <p>1 Commission doesn't like companies doing recalls for      2 any reason where they haven't been informed.</p> <p>3 Q. And if Spectrum had wanted the Commission      4 to make a determination that this defect did not      5 present a substantial product hazard, Spectrum could      6 have filed a conventional Section 15 report, right?</p> <p>7 A. Yes.</p> <p>8 Q. And then they could have had the      9 Commission make the determination of whether or not      10 the product presented a substantial product hazard,      11 right?</p> <p>12 A. Right. They could have done that and      13 relying on the previous decisions of the Commission,      14 staff might very well have concluded that there was      15 not a substantial product hazard.</p> <p>16 Q. But they didn't do that, right?</p> <p>17 A. But they didn't do that. They reported it      18 in the Fast Track like they did with other cases.</p> <p>19 Q. Now, if you look at page 21, you state,      20 "It is my opinion that Spectrum has reasonable      21 procedures in place that allows it to evaluate      22 information to determine whether it has a reporting</p>	<p style="text-align: center;">Page 105</p> <p>1 reasonableness, you didn't base that on any kind of      2 industry best practices or ISO standards or anything      3 of that nature, right?</p> <p>4 A. No, but I based it on experience that I've      5 had in going into the companies and evaluating their      6 procedures and looking to see whether the company, at      7 least on paper, represents that it has a process for      8 collecting safety-related information and escalating      9 that information within the company to the ultimate      10 decision makers.</p> <p>11 Q. So it's just your view of what      12 reasonableness means, right?</p> <p>13 A. Yes. And my view is formed by the      14 interaction I've had with other companies where I've      15 done these valuations.</p> <p>16 Q. And prior to the point where you make this      17 conclusion, in the entire preceding section, that's      18 simply a summary of information you reviewed and what      19 Mr. Stamp told you, right?</p> <p>20 A. Basically, yes.</p> <p>21 Q. And so you summarize the programs and then      22 you say that they're reasonable?</p>

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<p>1        A. Yes.</p> <p>2        Q. I'm going to move on to a new topic.</p> <p>3        Would you please turn to page 4 of your report?</p> <p>4        A. Yes.</p> <p>5        Q. I would like to discuss just for a bit the</p> <p>6        background information you provide on the CPSC. And</p> <p>7        just so I'm clear, is the time period that you're</p> <p>8        talking about here 2005 to 2008?</p> <p>9        A. It kind of all depends. We can do it</p> <p>10      section by section. Sometimes I limit it to 2005 to</p> <p>11      2008. Other times it may be broader than that.</p> <p>12      Q. Do you see the --</p> <p>13      A. I mean, when I say the Commission began</p> <p>14      operating 1973, it's obviously not 2005 to 2008.</p> <p>15      Q. I'm talking about when you're talking</p> <p>16      about their policies and procedures and how they</p> <p>17      evaluate risks in this section, is that the time</p> <p>18      period you're talking about?</p> <p>19      A. Generally, but I think I also say that</p> <p>20      procedures haven't changed.</p> <p>21      Q. Do you see subsection A, Reporting?</p> <p>22      A. Yes.</p>	<p>1        thereabouts?</p> <p>2        A. Yes.</p> <p>3        Q. Did you think the reporting requirement</p> <p>4        was just one other way in which you learned about</p> <p>5        information?</p> <p>6        A. It was an important way in which the</p> <p>7        Commission learned about information. I mean, I</p> <p>8        always tell companies that the Commission has so many</p> <p>9        data sources, they will eventually learn about safety</p> <p>10      problems with the product independently but</p> <p>11      companies -- a key way that they do learn is through</p> <p>12      company reports because companies may be in the best</p> <p>13      position to have reportable information.</p> <p>14      Q. And is part of the reason that the</p> <p>15      reporting requirement is so important because it gets</p> <p>16      information into the Commission's hands more quickly</p> <p>17      than maybe waiting for data to filter through NEISS?</p> <p>18      A. It can get there more quickly but NEISS is</p> <p>19      not the primary way that the Commission would learn</p> <p>20      about product-specific information. NEISS is fairly</p> <p>21      generic. It's good for identifying product trends</p> <p>22      but not so much for identifying problems with</p>
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<p>1        Q. And you state, "The CPSC learns about</p> <p>2        potential safety problems with products through a</p> <p>3        variety sources including consumer complaints, trade</p> <p>4        secrets, media reports, a public database at</p> <p>5        www.saferproducts.gov," and then you talk about</p> <p>6        NEISS, right?</p> <p>7        A. Right. Trade complaints as opposed to</p> <p>8        trade secrets.</p> <p>9        Q. And then you state, one other way in which</p> <p>10      the CPSC learns about potential consumer product</p> <p>11      safety problems is through a mandatory reporting</p> <p>12      requirement found at Section 15(b) reports, and I'm</p> <p>13      paraphrasing, is that right?</p> <p>14      A. Yes.</p> <p>15      Q. And then you cite the reporting standard</p> <p>16      under 15 U.S.C. Section 2064(b), right?</p> <p>17      A. Yes.</p> <p>18      Q. Now, Mr. Schoem, you were the head of the</p> <p>19      Office of Compliance for a number of years, right?</p> <p>20      A. Yes.</p> <p>21      Q. When you were the head of the Office of</p> <p>22      Compliance, how many years was it, seven,</p>	<p>1        specific products. But the Commission gets lots of</p> <p>2        consumer complaints, not just through</p> <p>3        saferproducts.gov but through its hotline, for</p> <p>4        example.</p> <p>5        Q. So you wouldn't use NEISS, for instance,</p> <p>6        to try to -- you wouldn't use that as the basis for</p> <p>7        determining the hazard that a product presents, would</p> <p>8        you?</p> <p>9        A. It's good for looking at patterns and</p> <p>10      trends with products. I mean, if you had a lot of</p> <p>11      NEISS incidents involving electrical fires or scalds,</p> <p>12      you might want to take a look at an industry as a</p> <p>13      result of what you're seeing through the NEISS data.</p> <p>14      If you saw lots of injuries being treated in hospital</p> <p>15      emergency rooms from cribs, for example, children who</p> <p>16      are in cribs being injured, that might send a message</p> <p>17      to the Commission staff that, gee, there seem to be a</p> <p>18      lot of NEISS incidents involving cribs, we need to go</p> <p>19      investigate to find out what's going on with cribs</p> <p>20      generally, and you might do that by going in to</p> <p>21      individual companies and asking for information. But</p> <p>22      you wouldn't necessarily know whether it's a</p>

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<p>1 product-specific incident.</p> <p>2 Q. So if you were trying to determine whether 3 a specific product needed to be reported, you don't 4 think it would be reasonable to rely exclusively on 5 the information contained in NEISS, saferproducts.gov 6 and the other CPSC databases, right?</p> <p>7 MR. MULLIN: Object to the form of the 8 question.</p> <p>9 THE WITNESS: Well, not in NEISS but in 10 saferproducts.gov, there is product-specific 11 information. And when a consumer complains to the 12 Commission, submits a complaint to the Commission and 13 is taken to a hotline, for example, that complaint is 14 supposed to be sent back to the company for comment. 15 If the Commission does an in-depth investigation of a 16 particular company's product, that in-depth 17 investigation is supposed to be sent back to the 18 company.</p> <p>19 BY MR. ROSS:</p> <p>20 Q. And that's one of the ways in which the 21 Commission notifies companies of potential problems 22 involving its products, right?</p>	<p>1 going on with that particular product.</p> <p>2 Q. But the CPSC wouldn't do an in-depth 3 investigation if the product was just the wrong color 4 or something, right?</p> <p>5 A. I wouldn't think so, no.</p> <p>6 Q. The CPSC is trying to determine whether a 7 product might be dangerous, right?</p> <p>8 A. Yes.</p> <p>9 Q. Or at least in part? It's part of that 10 process, right?</p> <p>11 A. Might present some risk to consumers that 12 the Commission should be concerned about.</p> <p>13 Q. And if the Commission had decided this 14 kind of product can't possibly create a reporting 15 obligation, it wouldn't bother to try to do that kind 16 of investigation, would it?</p> <p>17 A. I wouldn't say that because there were 18 cases where staff just went ahead and assigned 19 in-depth investigations even though it was the type 20 of risk that the staff was never going to follow up 21 on, never going to pursue.</p> <p>22 Q. Can you give me an example of that?</p>
<p>1 A. It notifies it of complaints and issues 2 that -- of which the Commission has been apprised and 3 provides that information to the company so that it 4 can consider it along with any other information it 5 has to determine if there is a reporting obligation, 6 or to evaluate the information and determine that 7 there is something inaccurate, misleading or wrong 8 about the information that the Commission obtained.</p> <p>9 Q. So does the CPSC go about investigating 10 complaints that it doesn't think could possibly be 11 reportable?</p> <p>12 A. I think when the Commission conducts an 13 investigation, it doesn't necessarily know whether 14 there is something that's reportable. So it might 15 get -- it might see a media report, it might get a 16 consumer complaint about a product. You don't 17 know -- you want to learn more about what's going on 18 with that product. And so if it's of interest to a 19 compliance officer or if it's of interest to somebody 20 else in the Commission who has got authority to 21 assign an in-depth investigation, for example, they 22 can assign it so that you can try and find out what's</p>	<p>1 A. No. I just know that it happened when I 2 was at CPSC where an in-depth investigation would be 3 assigned and then the supervisor would then look at 4 it and say, why did you bother assigning this? You 5 know, this isn't the type of issue we're going to 6 deal with, we're going to do anything about. So it 7 happens.</p> <p>8 Q. To get back to my original question, can a 9 company decide whether it has to report based solely 10 on sort of national injury trends relating to a 11 category of products?</p> <p>12 A. It's a factor for them to consider but no, 13 it's not something you would rely on exclusively.</p> <p>14 Q. I'm going to show you what we're marking 15 as Government Exhibit 86.</p> <p>16 (Government Exhibit No. 86 was 17 marked for identification.)</p> <p>18 BY MR. ROSS:</p> <p>19 Q. Mr. Schoem, did you provide testimony in 20 the case United States vs. Mirama Enterprises back in 21 early 2000?</p> <p>22 A. Yes.</p>

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<p>1       Q. And you testified at the hearing in which 2       the government was seeking a civil penalty, right? 3       A. Yes. 4       Q. And the attorney who worked with you on 5       that case was Mr. Jasperse, right? 6       A. Yes. 7       Q. And at the time that you gave this 8       testimony, which was around 2002, you were the head 9       of the Office of Compliance, correct? 10      A. Yes. 11      Q. And you gave this testimony in court and 12     under oath, right? 13      A. Yes. 14      Q. Just like you're testifying here today 15     under oath? 16      A. That's correct. 17      Q. Would you please turn to page 1-31? And 18     you'll see the numbers in the top right-hand corner 19     of the transcript. Do you see line number 10? 20      A. Yes. "How many employees"? 21      Q. "How many employees does the CPSC have to 22     help it oversee 15,000 types of products?" Do you</p>	<p>1       makers, you could have a number of different 2       products, right? 3       A. Yes. 4       Q. Or you could have a drip coffee machine, 5       right? 6       A. Yes. 7       Q. A single-serve coffee machine? 8       A. Yes. 9       Q. Or any number of different kinds of 10      products, right? 11      A. Correct. 12      Q. So there is potentially an enormous 13      combination of product types and hazards presented 14      that the CPSC oversees in the ordinary course of its 15      business, right? 16      A. Right. 17      Q. And on page 1-31, you're asked, "How many 18      employees does the CPSC have to help it oversee 19      15,000 types of products?" 20      And your response is, "Our authorized 21      ceiling is 480 employees, but we typically have 22      somewhere around 460 to 470 at any time." Do you see</p>
<p>see that question?</p> <p>A. Yes.</p> <p>Q. Now, the 15,000 number, that's referring to the many different types of consumers products over which the CPSC has jurisdiction, right?</p> <p>A. Yes.</p> <p>Q. And within each of those product categories, a product could present any number of different hazards, right?</p> <p>A. Yes.</p> <p>Q. So if you use coffee makers, for example, it could present a scalding hazard, right?</p> <p>A. Yes.</p> <p>Q. Or a laceration hazard, right?</p> <p>A. Yes.</p> <p>Q. Or an electrical hazard, right?</p> <p>A. Yes.</p> <p>Q. Or a fire hazard, right?</p> <p>A. Correct.</p> <p>Q. Any number of hazards?</p> <p>A. Any number.</p> <p>Q. And even within the category of coffee</p>	<p>that?</p> <p>A. Yes, I do.</p> <p>Q. And is the number of employees at CPSC much different than that today?</p> <p>A. I don't think so. Probably a few more.</p> <p>Q. Now, the next question you were asked here starting on line 14 is, "Does the CPSC have enough employees to do its job?"</p> <p>And you respond, "No. Of course, that's what probably every employee in a federal agency says but, in my view, we don't." Do you see that?</p> <p>A. I do.</p> <p>Q. And if you scroll down a little bit, you give some explanation and you say, "We have 15,000 products within our jurisdiction. It's an extremely large mission, and we do the best we can with the resources that we have." Do you see that statement?</p> <p>A. I do.</p> <p>Q. Is that statement as true today as it was in 2002 when you were testifying under oath?</p> <p>A. Yes, other than I wouldn't say we do the best we can. I would say that they do the best they</p>

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<p>1 can.</p> <p>2 Q. Do you agree that the CPSC has an</p> <p>3 extremely large mission?</p> <p>4 A. Yes.</p> <p>5 Q. Do you agree the CPSC does the best it can</p> <p>6 with the resources that it has?</p> <p>7 A. Yes.</p> <p>8 Q. Now, in the question that continues to the</p> <p>9 next page, you're asked if the CPSC can proactively</p> <p>10 investigate each product. Specifically you're asked,</p> <p>11 "Is it possible for the Commission with less than</p> <p>12 500 people to proactively go out and identify every</p> <p>13 dangerous product?" Do you see that question?</p> <p>14 A. I do.</p> <p>15 Q. And your response is, "No. We can't</p> <p>16 initiate investigations into every potential product</p> <p>17 hazard or every defect, and that's why we rely very</p> <p>18 heavily on the reporting provision in the Consumer</p> <p>19 Product Safety Act." Do you see that?</p> <p>20 A. Yes, I do.</p> <p>21 Q. Do you agree that the CPSC today still</p> <p>22 relies very heavily on the reporting requirement?</p>	<p>1 A. I do.</p> <p>2 Q. Do you agree that it was Congress' intent</p> <p>3 that companies report potentially dangerous products</p> <p>4 to the Commission immediately upon learning of the</p> <p>5 problem?</p> <p>6 MR. MULLIN: Object to the form of the</p> <p>7 question.</p> <p>8 THE WITNESS: Yes.</p> <p>9 BY MR. ROSS:</p> <p>10 Q. And under the CPSC's regulations,</p> <p>11 immediately means 24 hours, right?</p> <p>12 A. Right, but then it's qualified.</p> <p>13 Q. And companies have 10 days to report or to</p> <p>14 investigate an issue, and potentially another 5 days</p> <p>15 to escalate that to the top of the company, right?</p> <p>16 A. Right, but then there is also language in</p> <p>17 there that says "or a reasonable period of time."</p> <p>18 It's not specifically 10 days. It's like guidance to</p> <p>19 companies that you can take up to 10 days unless a</p> <p>20 longer period is needed.</p> <p>21 Q. Well, do the regulations provide that the</p> <p>22 CPSC presumes that companies are actively informed</p>
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<p>1 A. I do.</p> <p>2 Q. And do you agree today that the CPSC does</p> <p>3 not have sufficient resources to proactively</p> <p>4 investigate every potential consumer product that</p> <p>5 presents a safety problem?</p> <p>6 A. I do.</p> <p>7 Q. Now, we're still on page 1-32.</p> <p>8 Mr. Jasperse asks you, "How does relying on the</p> <p>9 reporting requirement help the Commission?"</p> <p>10 And you respond, "In my view, the singular</p> <p>11 most important provision in any of the statutes that</p> <p>12 we administer is the reporting requirement under</p> <p>13 15 U.S.C. 2064(b). Congress understood that</p> <p>14 manufacturers, distributors, importers and retailers</p> <p>15 typically are in the best position to know what's</p> <p>16 going on with their products. And so Congress</p> <p>17 required that companies report potentially dangerous</p> <p>18 products to the Commission immediately upon learning</p> <p>19 of a problem." Do you see that?</p> <p>20 A. Yes, I do.</p> <p>21 Q. Do you agree that's as true today as it</p> <p>22 was in 2002?</p>	<p>1 about an issue after 10 days of investigation?</p> <p>2 A. It presumes, but again, that's the</p> <p>3 Commission's interpretation. It's an interpretive</p> <p>4 regulation and not substantive.</p> <p>5 Q. Sir, in your mind, companies can just take</p> <p>6 that under advisement and disregard it if they see</p> <p>7 necessary?</p> <p>8 A. I didn't say that.</p> <p>9 Q. You also state that, "By reporting early</p> <p>10 to the Commission, it gives the staff an opportunity</p> <p>11 to conduct an investigation and decide whether a</p> <p>12 recall is necessary. It gives us an early warning of</p> <p>13 a potential problem with a product." Do you see</p> <p>14 that?</p> <p>15 A. Yes.</p> <p>16 Q. And that's consistent with what we talked</p> <p>17 about earlier about how if the Commission doesn't</p> <p>18 have information, it can't determine whether a recall</p> <p>19 or even a report itself is necessary, right?</p> <p>20 A. If it has no information, yes, that's</p> <p>21 correct.</p> <p>22 Q. And would you agree that the entity in the</p>

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<p>1 best position to get this information to the CPSC is 2 the manufacturer itself?</p> <p>3 A. It may be the manufacturer. In some cases 4 it may be retailers.</p> <p>5 Q. In this instant case, do you agree --</p> <p>6 A. The instant case being Spectrum?</p> <p>7 Q. Spectrum case. Do you agree, based on 8 your review of the documents, that Spectrum was in 9 the best position to inform the CPSC about this issue 10 if it decided to do so?</p> <p>11 MR. MULLIN: Object to the form of the 12 question as beyond the scope of what he was retained 13 to do, but you can answer.</p> <p>14 THE WITNESS: I don't know what 15 information retailers, for example, had so I don't -- 16 I'm a little qualifying that whether they were in the 17 best position. They were in a position to know.</p> <p>18 BY MR. ROSS:</p> <p>19 Q. Based on your review of the documents, 20 did --</p> <p>21 A. But I didn't review any --</p> <p>22 Q. Go ahead. Please, I interrupted you.</p>	<p>1 information it has and determine whether the 2 information reasonably supports the conclusion that 3 there is a defect that could create a substantial 4 product hazard or creates an unreasonable risk of 5 serious injury or death. If it doesn't meet that 6 standard, then there is no reporting obligation.</p> <p>7 Q. But just because a company has reached 8 that conclusion, is it necessarily reasonable? 9 Can a company be wrong?</p> <p>10 A. Anybody -- the Commission is very good at 11 second-guessing companies' decisions whether to 12 report. And I suppose that's what this case is all 13 about, if Spectrum made an informed decision that it 14 didn't think it had a reporting obligation. The 15 Commission, the government, disagrees with that 16 conclusion.</p> <p>17 Q. So just because a company reaches a 18 decision and believes it doesn't have to report, that 19 doesn't necessarily mean that it's true that they 20 didn't in fact have to report under the law, right?</p> <p>21 A. I guess that's what the Court will decide 22 in this case.</p>
<p style="text-align: center;">Page 123</p> <p>1 A. I didn't review any documents having to do 2 with -- I don't recall reviewing any documents having 3 to do with what retailers knew. So I don't know 4 whether there was any other entity that also had a 5 reporting or may have had a reporting obligation to 6 CPSC. So I'm only quibbling with your use of the 7 word of whether they were in, I think you said best 8 position.</p> <p>9 Q. Well, were they in a better position than 10 the Commission to know about this issue?</p> <p>11 MR. MULLIN: Same objection.</p> <p>12 THE WITNESS: I don't know exactly what 13 information the Commission had to know whether 14 Spectrum was in a better position than the Commission 15 but I'm not quibbling with whether Spectrum had a 16 reporting obligation if it believed that it had 17 reportable information.</p> <p>18 BY MR. ROSS:</p> <p>19 Q. And is that the standard, that a reporting 20 obligation only exists if the company believes it has 21 one?</p> <p>22 A. Well, a company has to evaluate the</p>	<p style="text-align: center;">Page 125</p> <p>1 Q. Please turn to page 1-33. Starting on 2 line 22, do you see that?</p> <p>3 A. Yes.</p> <p>4 Q. Mr. Jasperse asked you, "You mentioned the 5 reporting requirement several times. Can you just 6 refresh us on what the reporting requirement is?" 7 And you see your answer starting on 8 page 1-33 and going to the next page.</p> <p>9 A. Yes.</p> <p>10 Q. And you state that, "In 15 U.S.C. 2064(b), 11 if a manufacturer, distributor, retailer or importer 12 obtains information which reasonably suggests the 13 conclusion that a product has a defect which could 14 create a substantial product hazard or presents an 15 unreasonable risk of serious injury or death, it is 16 required to immediately report to us," right?</p> <p>17 A. You said reasonably suggests and the 18 language is reasonably supports.</p> <p>19 Q. "Reasonably supports" is the language from 20 the statute, right?</p> <p>21 A. Right.</p> <p>22 Q. If I said suggests, that's a mistake. It</p>

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<p>1 says supports. But you're quoting the standard right 2 here, right?</p> <p>3 A. Yes.</p> <p>4 Q. And that standard is interpreted in CPSC 5 regulations, right?</p> <p>6 A. Yes.</p> <p>7 Q. And the CPSC from time to time issues 8 guidance documents about what it thinks the reporting 9 requirement means, right?</p> <p>10 A. It's issued an interpretative regulation.</p> <p>11 Q. It's issued a recall handbook too, right?</p> <p>12 A. It's got a recall handbook which more or 13 less parrots the interpretative regulation.</p> <p>14 Q. And from time to time CPSC representatives 15 will participate in public forums or conferences to 16 talk about this issue?</p> <p>17 A. Yes.</p> <p>18 Q. And you did that when you were at 19 Compliance, right?</p> <p>20 A. Yes.</p> <p>21 Q. Now, you continue to say here that, "Under 22 our regulations, we have interpreted 'immediately' to</p>	<p>1 MR. MULLIN: Object to the form of the 2 question. You can answer.</p> <p>3 THE WITNESS: What the Commission has said 4 is if you're in doubt, you should report. The 5 corollary is if you're not in doubt, then you don't 6 have to report.</p> <p>7 BY MR. ROSS:</p> <p>8 Q. And companies have the ability to call up 9 the CPSC and ask them about these issues if they're 10 not certain, right?</p> <p>11 A. They do but I think things have changed at 12 the Commission since I was there and since I made 13 these statements. When I was at the Commission, 14 companies would call up and lay out a scenario and 15 say, do you think this is reportable? And in a 16 number of cases, we would say, no, we don't think 17 that's reportable.</p> <p>18 Today I don't think the staff is quite as 19 forthcoming as it was when I was there. I'm not sure 20 that the staff was then as self-confident as the 21 staff was when I was there. Supervisors, team leads, 22 when I was at the Agency, when they thought</p>
<p style="text-align: center;">Page 127</p> <p>1 mean within 24 hours, and we do provide that if firms 2 aren't sure, they could take up to 10 days to 3 investigate, but our regulations tell firms to err on the 4 side of safety, err on the side of caution." Do 5 you see that?</p> <p>6 A. Yes, I do.</p> <p>7 Q. Do you agree that firms should err on the 8 side of safety and err on the side of caution?</p> <p>9 A. If they have -- if they believe they have 10 reportable information, yes, they should.</p> <p>11 Q. And you say, "If you have any question, 12 report to us or pick up the phone, call us and talk 13 to us about whether you should report." Do you see 14 that?</p> <p>15 A. Yes.</p> <p>16 Q. Now, are you familiar with CPSC's public 17 statements that when in doubt, a company should 18 report?</p> <p>19 A. Yes.</p> <p>20 Q. So is it the CPSC's view that unless a 21 company is certain that it doesn't have to report, 22 that it probably should?</p>	<p style="text-align: center;">Page 129</p> <p>1 something -- when there was a matter that the staff 2 had looked at previously, decided that this doesn't 3 rise to the level of a substantial hazard, it would 4 convey that to a company that might call or a lawyer 5 that might call for a company and say, this is the 6 scenario we've got, do you think this is reportable. 7 We might say, you know, we've been there, done that, 8 we've looked at this information in the past, we 9 don't think this type of information is reportable. 10 If this is what you have, then we don't think it's 11 reportable.</p> <p>12 And I would always tell companies, when 13 you're getting that opinion from somebody on staff, 14 from a team lead, a supervisor, document it, put it 15 in writing, send in an email that says, this is to 16 confirm that you told us this. And that was just to 17 protect the company from some other compliance 18 officer who might initiate investigation of the same 19 matter that they had previously been told wasn't an 20 issue.</p> <p>21 Q. So if a firm is materially relying on 22 something they believe the CPSC is saying, it's</p>

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<p>1     probably a good idea for them to document it so that      2     there is some proof of that fact?</p> <p>3       A. Yes.</p> <p>4       Q. And I'm just trying to understand what you      5     said before. Is it your testimony that if somebody      6     called up CPSC staff now, they wouldn't discuss the      7     issue of whether something might be reportable?</p> <p>8       A. They might discuss it but I think at the      9     end of that call, they would say you better report,      10    as opposed to, no, I don't think this is reportable.</p> <p>11      Q. And you see this as a problem?</p> <p>12      A. It's not that it's a problem. It's just      13    that the staff is not using as much discretion as      14    they used to do in trying to provide advice and      15    guidance to companies to help guide them on what the      16    staff or the Commission considers to be a substantial      17    product hazard.</p> <p>18      Q. And you're talking about guidance provided      19    over the phone?</p> <p>20      A. Yes.</p> <p>21      Q. When --</p> <p>22      A. I mean, when we talk about err on the side</p>	<p>1     occasions, I believe.</p> <p>2       Q. And we discussed a moment ago the 15,000      3     different types of consumer products that the      4     Commission receives, right?</p> <p>5       A. Yes.</p> <p>6       Q. And the many different kinds of products      7     and hazards that can present with each one of those      8     kinds of products, right?</p> <p>9       A. Yes.</p> <p>10      Q. Do you think it's feasible that the      11    Commission would provide specific guidance on whether      12    every single one of those possible combinations of      13    product and hazard should be reported?</p> <p>14      A. Not in every one but I think the      15    Commission could give guidance on specific product      16    areas that have been issues over the years. I do      17    suggest in here and -- you know, I've been out of the      18    Commission for 12 years now so I've learned a lot      19    more than when I was at the Agency and I think the      20    Commission could give more specific guidance to      21    companies on what it considers to be a substantial      22    product hazard.</p>
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<p>1     of safety in the report, as I say in my report, the      2     guidelines that the Commission has, except for the      3     definition of defect and serious injury, are fairly      4     general. It's look at this type of information, look      5     at these criteria. If you're not sure what to do,      6     report. And it's because the guidance isn't      7     specific. It doesn't say if you have this situation,      8     it's clearly reportable or if you have this type of      9     risk or this type of injury.</p> <p>10      We're always going to find it's a      11    substantial hazard. Now, the Commission has done      12    that on a few occasions. It has issued rules. I      13    think there are children's outerwear garments where      14    it has clarified for the industry that if you have a      15    cord on an outerwear of a child's garment at the neck      16    or the waist area, we've determined that's a      17    substantial product hazard. And I think they may      18    have done it for hair dryers. If you don't have an      19    immersion protection device on a hair drier, it's a      20    substantial product hazard.</p> <p>21      The Commission hasn't done that for things      22    like coffee makers. They've done it on two or three</p>	<p>1       Q. So if the Commission, for instance,      2     thought that issues with carafe handle failures on      3     coffee makers was something that should be reported      4     and the Commission knew about this issue, you're      5     saying that they should inform the public that, yes,      6     carafe handle failures should be reported?</p> <p>7       A. It should at least inform manufacturers.      8       When you go through the PI and the RP cases that I      9     looked at, with the one exception, the Commission      10    staff, when it was a conventional report, where it      11    was a staff-initiated investigation, the Commission      12    staff closed eight or nine cases where there was      13    contact between a hot liquid, either from a broken      14    carafe handle, from exploding pods, allegations and      15    reports of burns, scalds, second degree burns, the      16    Commission staff closed those cases and they said no      17    substantial product hazard.</p> <p>18      Don't you think it's important that the      19    Commission inform companies that we don't think this      20    type of risk rises to the level of a substantial      21    product hazard? It would cut down on the number of      22    Fast Track reports perhaps where companies report the</p>

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<p>1 same type of risk and incidents that the staff is      2 closing cases on and not pursuing corrective action      3 and yet companies are reporting and staff routinely      4 accept those under Fast Track and announces a recall.      5 Q. So is it your testimony that the      6 Commission has decided that hot water scalds can      7 never be a substantial product hazard?      8 A. I didn't say that.      9 Q. Is it your testimony that the handful of      10 cases that you review represent every possible      11 combination of facts and circumstances under which a      12 coffee maker might present a substantial product      13 hazard because of scald injuries?      14 A. I didn't say that either. I know that the      15 government provided to Spectrum in discovery all of      16 the -- was supposed to provide in discovery all of      17 the closed coffee maker cases for some period of time      18 and I don't know if it was 10 years or shorter or      19 longer, so if all of the documents were in fact      20 provided -- I know at least one file seems to be      21 missing -- that would give the universe of hot water,      22 hot liquid contact by consumers in all of these</p>	<p>1 other company cases, then no, it doesn't bear on the      2 reporting obligation. But Spectrum had at least two      3 cases where the Commission staff investigated and      4 decided that the risk did not rise to the level of a      5 substantial product hazard and closed the cases. And      6 if Spectrum relied on those decisions -- I said if      7 Spectrum relied on those decisions, then it would be      8 reasonable for Spectrum to conclude, in my opinion,      9 that they didn't have a reporting obligation in this      10 case where the risk of injury was significantly less      11 than it was in the cases where the Commission staff      12 closed the cases.      13 Q. How do you reach the determination that      14 the risk in this case was significantly less than      15 other cases?      16 A. I skimmed and I didn't read all of the      17 1,500 or so complaints that had been submitted. I      18 looked at the full report information. I looked at      19 the government's complaint in this matter. And while      20 there may have been 1,500 or so claims of carafe      21 handles breaking or splitting or coming loose, there      22 were 67 or 68, I think I said less than 70 complaints</p>
<p style="text-align: center;">Page 135</p> <p>1 different coffee maker cases that the Commission has      2 looked at for, let's say, 10 years, which ought to      3 give a good benchmark of how the Commission staff or      4 the Commission feels about hot water from coffee      5 makers contacting consumers.      6 Q. So this is your opinion on what the CPSC      7 could do to, in your view, improve the reporting      8 process?      9 A. Yes.      10 Q. It's not something that under the law the      11 CPSC is required to do, is it?      12 A. No, but it's good government, in my      13 opinion. I didn't say there were -- I never said      14 they were required to do this.      15 Q. Is there any legal importance whatsoever      16 to your argument?      17 A. How do you define legal importance? Legal      18 importance in what context?      19 Q. Did the cases that the CPSC decided, of      20 which Spectrum never had any knowledge, bear on      21 Spectrum's reporting requirement?      22 A. If Spectrum had no knowledge of those</p>	<p style="text-align: center;">Page 137</p> <p>1 of a hot liquid actually contacting a consumer in      2 some way and, of those cases, I didn't see any      3 reports of serious injuries. There were two reports      4 of consumers seeking medical treatment and I don't      5 know if that was for glass breakage or for liquid,      6 but from the documents I read, it doesn't appear that      7 there were any medical claims submitted to Spectrum.      8 But the nature of that risk seemed significantly less      9 than what I saw in the two PI cases that the staff      10 closed.      11 Q. And you're basing that on injuries that      12 you believe occurred or didn't occur, right?      13 A. I'm basing it on the materials that I      14 looked at and representations that were made to the      15 Commission in the full report and in the Commission      16 preliminary determinations that were made.      17 Q. Is it your understanding that preliminary      18 determinations were made the those PI cases?      19 A. Well, the staff hemmed and hawed about      20 whether it was a formal preliminary determination but      21 my impression is that was more form over substance.      22 Q. Do you know whether the preliminary</p>

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<p>1 determination panel considered either of those cases?</p> <p>2 A. Well, I know in the Judy Hayes case, it</p> <p>3 was the one that ends in 23, doesn't appear -- from</p> <p>4 what she said, there was never a formal preliminary</p> <p>5 determination panel that met. But when I was there,</p> <p>6 preliminary determination panels didn't always meet.</p> <p>7 And I thought there was something maybe in</p> <p>8 the current Compliance manual that says you don't</p> <p>9 always have a panel meeting, things can be done by</p> <p>10 paper with sign-offs. In this case, there was no</p> <p>11 attorney sign-off -- in 23, the Judy Hayes case,</p> <p>12 there was no attorney sign-off. There was a</p> <p>13 supervisor sign-off.</p> <p>14 Q. You're talking about Mary Toro?</p> <p>15 A. Yes.</p> <p>16 Q. And do you know better than Judith and</p> <p>17 Mary Toro about that forum went and what happened in</p> <p>18 that meeting?</p> <p>19 A. No, because I wasn't at that meeting.</p> <p>20 Q. So you don't know what they talked about</p> <p>21 at all, right?</p> <p>22 A. I know what's on the preliminary</p>	<p>1 A. I know -- I can only know from reading the</p> <p>2 documents. That's the only thing that's publicly</p> <p>3 available. I wasn't at the meetings. I didn't</p> <p>4 attend the meeting. I don't know what Mary said to</p> <p>5 Judy or Judy said to Mary. I just know that there is</p> <p>6 a preliminary determination form which lays out, just</p> <p>7 like on the form when there is a formal preliminary</p> <p>8 determination panel meeting, there is a form that was</p> <p>9 filled out and it was signed off on by the compliance</p> <p>10 officer and the compliance officer's supervisor.</p> <p>11 Q. Is there any legal import with respect to</p> <p>12 firms when the Commission makes a preliminary</p> <p>13 determination of a substantial product hazard?</p> <p>14 MR. MULLIN: Object to the form of the</p> <p>15 question.</p> <p>16 THE WITNESS: What do you mean? I don't</p> <p>17 understand your question.</p> <p>18 BY MR. ROSS:</p> <p>19 Q. Is there no difference in practical</p> <p>20 purposes when a firm makes a preliminary</p> <p>21 determination versus when it doesn't?</p> <p>22 MR. MULLIN: Object to the form of the</p>
<p style="text-align: center;">Page 139</p> <p>1 determination form, because I read it, and I know</p> <p>2 what's in the letter that they sent closing the case.</p> <p>3 Q. And if it wasn't a preliminary</p> <p>4 determination, is it merely a staff consideration</p> <p>5 that there is no substantial product hazard?</p> <p>6 A. Even preliminary determinations in the</p> <p>7 form of a panel are still staff considerations.</p> <p>8 There would have been a few more people perhaps</p> <p>9 involved in the process. There would have been an</p> <p>10 attorney involved and I think that's the only other</p> <p>11 person that would have been involved according to the</p> <p>12 2002 complaints manual. If I'm remembering correctly,</p> <p>13 it's the compliance officer, the supervisor and the</p> <p>14 attorney who vote, is my recollection from that</p> <p>15 manual. So you didn't have the attorney voting on</p> <p>16 this case.</p> <p>17 Q. So in your mind, actually convening a</p> <p>18 panel and following procedures is just form over</p> <p>19 substance?</p> <p>20 A. I didn't say that either.</p> <p>21 Q. And you don't know what happened in this</p> <p>22 particular case, right?</p>	<p style="text-align: center;">Page 141</p> <p>1 question. You can answer.</p> <p>2 THE WITNESS: When the staff -- I don't</p> <p>3 understand your question.</p> <p>4 BY MR. ROSS:</p> <p>5 Q. Now, your assessment of the risk here is</p> <p>6 based off of your review of the reported incidents in</p> <p>7 the three different cases, right? Is that what you</p> <p>8 said?</p> <p>9 A. Which three cases?</p> <p>10 Q. The three <i>Aplica</i> cases, the current one</p> <p>11 and the two PI cases.</p> <p>12 A. Yes.</p> <p>13 Q. And with respect to the instant case, you</p> <p>14 only know what you saw in those incident reports,</p> <p>15 right?</p> <p>16 A. Yes. And what was in the government's</p> <p>17 complaint and what was in the full report</p> <p>18 information.</p> <p>19 Q. Do you know whether Spectrum verified or</p> <p>20 attempted to verify any of those complaints?</p> <p>21 A. What do you mean by verified? Did they go</p> <p>22 out on-site to talk to the consumer? I don't know.</p>

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<p>1       Q. Do you know whether Spectrum followed up 2 and found out whether or not more serious injury 3 occurred than was reported in those complaints?</p> <p>4       A. I don't know. I don't recall, again, 5 because I skimmed the complaints. I don't know if 6 there was some follow-up of what was reflected in any 7 of those complaints, and that's why I'm hesitating on 8 my answer is I don't recall from the incident reports 9 whether they reflected that Spectrum did any 10 follow-up or not.</p> <p>11      Q. So you don't know if they did follow-up?</p> <p>12      A. So I don't know.</p> <p>13      Q. And you did not perform any kind of 14 assessment of the failure mechanisms in those three 15 cases, right?</p> <p>16      A. No.</p> <p>17      Q. So your assessment of the risk of the 18 product is based entirely on injuries that in fact 19 happened or that you believe happened, right?</p> <p>20      A. It's based on the documents that I 21 reviewed. That's all I can base it on.</p> <p>22      Q. And does the reporting requirement state</p>	<p>1       A. I didn't say no coffee maker cases. I 2 said in this case. In this case, it was reasonable 3 for Spectrum to look at those two PI cases, to look 4 at the determinations that had been made by the staff 5 that there was no substantial product hazard and take 6 that into consideration in determining whether it had 7 a reporting obligation to CPSC in this case. Because 8 in those cases, there were serious burn injuries, 9 there were allegations and reports of second degree 10 burns and I didn't see that in this case.</p> <p>11      In this case, all I saw were reports of 12 minor burn incidents. I didn't see that there was 13 any reflection of serious burns. I looked at the 14 government complaint thinking that the government in 15 its complaint would likely use the most serious 16 injuries and reflect that in the complaint and I 17 didn't see that.</p> <p>18      Q. So from here on out, as long as the coffee 19 maker doesn't cause more or more serious injuries 20 than those two PI cases, Spectrum doesn't have to 21 report them?</p> <p>22      MR. MULLIN: Object to the form of the</p>
<p style="text-align: center;">Page 143</p> <p>1       that companies can wait to see what kind of injuries 2 happen to decide whether or not they have to report a 3 product?</p> <p>4       A. No, it doesn't say that. But again, if 5 Spectrum was relying on the Commission staff's 6 decision that there was no substantial hazard in the 7 two PI cases that it closed, I think it was 8 reasonable for them to rely on. Remember this case 9 is -- they got a letter that says, we decided the 10 information doesn't rise to the level of a 11 substantial hazard but Spectrum, because it was the 12 company that was the recipient of that letter, also 13 had all of the incident information available to it 14 in those two cases. So it's reasonable for it to use 15 the information in those cases to inform its decision 16 in the instant case as to whether it had a reporting 17 obligation.</p> <p>18      Q. So you're saying that based on those two 19 letters, Spectrum reasonably concluded that no coffee 20 maker case presenting risks of second degree burns, 21 hospitalization and possible surgery needed to be 22 reported?</p>	<p style="text-align: center;">Page 145</p> <p>1       question.</p> <p>2       THE WITNESS: Spectrum has to look at the 3 information that it has in its possession and make a 4 factual determination as to whether it has an 5 obligation to report based on the information -- all 6 of the information that it reviews.</p> <p>7      BY MR. ROSS:</p> <p>8       Q. And that includes both injuries that have 9 happened and the potential for injuries, correct?</p> <p>10      A. Yes.</p> <p>11      Q. Now, when you were reviewing files for 12 this case, did you review historical emails and 13 documents from 2008 and 2009?</p> <p>14      A. I reviewed the documents that I reflect in 15 my report that I reviewed.</p> <p>16      Q. Did those documents include historical 17 documents from 2008 and 2009?</p> <p>18      A. Yes.</p> <p>19      Q. What kinds of documents?</p> <p>20      A. If you have specific documents in mind 21 that you would like me to look at, I'm happy to look 22 at them.</p>

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<p>1       Q. Well --</p> <p>2       A. But I looked at the documents that --</p> <p>3       there were emails that -- between the company and the</p> <p>4       compliance staff. There were full reports. I mean,</p> <p>5       those are historical documents, I guess. There was</p> <p>6       full report information that was provided. There</p> <p>7       were some back and forth between the company and the</p> <p>8       compliance staff. I looked at those documents.</p> <p>9           I mean, I don't know what you're getting</p> <p>10          at. I don't know really what your question is and</p> <p>11          what you're asking me.</p> <p>12          Q. Do you know what Spectrum knew about this</p> <p>13          issue before most or all of these reported burns</p> <p>14          actually happened?</p> <p>15          MR. MULLIN: Object to the form of the</p> <p>16          question.</p> <p>17          THE WITNESS: No. I only know what was</p> <p>18          reported in the full report.</p> <p>19          BY MR. ROSS:</p> <p>20          Q. Now -- are you done? I'm sorry.</p> <p>21          A. Yes.</p> <p>22          Q. Now, you testified earlier that you agree</p>	<p>1       the company consider whether or not it has to report</p> <p>2       that information?</p> <p>3           A. It should consider that. It would also</p> <p>4       look at, you know, what's the consequence of the</p> <p>5       handle breaking. You have to look at the likelihood</p> <p>6       of injury. If the carafe is at a certain level. It</p> <p>7       depends on if it's been sitting for a while. If it's</p> <p>8       freshly brewed coffee, presumably hotter than it is</p> <p>9       if it's been sitting there for an hour. Take all of</p> <p>10       that information into consideration, yes.</p> <p>11          Q. But if you've identified the failure mode</p> <p>12       before there are many incidents, you have no way of</p> <p>13       comparing the injuries from one case and what</p> <p>14       injuries ultimately would happen in that case, right?</p> <p>15          A. I wouldn't say you can't compare. If</p> <p>16       you've got similar issues, again, it's reasonable for</p> <p>17       a company to look at what has happened to it or what</p> <p>18       it's done in the past with respect to a particular</p> <p>19       product.</p> <p>20          Q. What I'm asking is, if you have a product</p> <p>21       that you understand presents a risk of burning</p> <p>22       people, potentially severely, and you recognize this</p>
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<p>1       that if a handle breaks off a coffee pot, it can</p> <p>2       spill on somebody, right?</p> <p>3           A. Yes.</p> <p>4           Q. And if hot coffee at sufficient</p> <p>5       temperature spills on somebody, it can cause severe</p> <p>6       burns, right?</p> <p>7           A. If it's the right temperature, it can</p> <p>8       cause severe burns, yes, I would agree with that.</p> <p>9       It's possible.</p> <p>10          Q. And if it's a fairly prevalent problem, it</p> <p>11       might expose a number of consumers to that risk,</p> <p>12       right?</p> <p>13          A. Yes.</p> <p>14          Q. So sometimes, though, companies discover</p> <p>15       problems through other ways, engineering analyses,</p> <p>16       before there is a significant number of incidents</p> <p>17       reported, right?</p> <p>18          A. It's possible, yes.</p> <p>19          Q. And if a company was sitting there and</p> <p>20       discovered that there was an issue with a product</p> <p>21       that caused the handle to fall off the coffee pot but</p> <p>22       there hadn't been many incidents reported yet, should</p>	<p>1       problem before many incidents or injuries have even</p> <p>2       been reported, how do you go about comparing the</p> <p>3       injuries in that case to a prior case?</p> <p>4          MR. MULLIN: Object to the form of the</p> <p>5       question.</p> <p>6          THE WITNESS: You'd have to look at</p> <p>7       whether there is the potential for severe burn</p> <p>8       injuries or not.</p> <p>9          BY MR. ROSS:</p> <p>10          Q. Well, did you -- I'm sorry.</p> <p>11          A. Again, the reporting obligation doesn't</p> <p>12       say if you have incidents or some engineering</p> <p>13       information that you're automatically obligated to</p> <p>14       report. You have to look at whether that information</p> <p>15       rises to the level of a -- let's assume that that's a</p> <p>16       defect and the handle shouldn't be falling apart.</p> <p>17       Does that defect rise to the level of it could create</p> <p>18       a substantial risk of injury to the consumers.</p> <p>19          And so the company should be looking at</p> <p>20       all of the information that it has in its possession</p> <p>21       with respect to that risk in making an informed</p> <p>22       decision as to whether it has a reporting obligation</p>

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<p>1 to CPSC.</p> <p>2 Q. So the company can't rely entirely on what</p> <p>3 happened in a prior case, right?</p> <p>4 A. No, it can't rely entirely. It can use</p> <p>5 that to help inform its decision as to whether it has</p> <p>6 a reporting obligation, but it still has to look at</p> <p>7 all of the information that it has -- that it</p> <p>8 reasonably has in its possession.</p> <p>9 Q. If you would please turn to page 1-40 in</p> <p>10 this document.</p> <p>11 I'm not going to read the whole Q and A</p> <p>12 here because it's quite long but if you look at</p> <p>13 line 18, you say, "The sooner we get -- if a company</p> <p>14 reports and we're getting early information about a</p> <p>15 potential hazard and a recall is necessary, the</p> <p>16 sooner we can get a recall in place, the less likely</p> <p>17 it is that consumers will be injured or we'll cut</p> <p>18 down on the number of injuries that occur." Do you</p> <p>19 see that answer?</p> <p>20 A. Yes, I do.</p> <p>21 Q. Do you agree with that answer?</p> <p>22 A. I do. And I would just emphasize it's</p>	<p>1 incidents have to be a situation where those</p> <p>2 incidents or the problem with the product could</p> <p>3 create a substantial risk of injury to the public.</p> <p>4 Q. And that's a factual determination based</p> <p>5 on the information in the company's possession as</p> <p>6 applied to the reporting requirement under the CPSA,</p> <p>7 right?</p> <p>8 A. Yes. And the company can decide -- a</p> <p>9 company can look at all the information that it has</p> <p>10 in its possession. It can look at all the past</p> <p>11 dealings that it's had with the Commission. It can</p> <p>12 then make a decision, we've looked at all of this</p> <p>13 information and we don't think we have a reporting</p> <p>14 obligation and it doesn't report.</p> <p>15 The Commission can second-guess that</p> <p>16 company's decision and tell the company that it</p> <p>17 thinks it was wrong and can demand that it pay a</p> <p>18 civil penalty. And if the company believes that it</p> <p>19 did not have a reporting obligation, the company has</p> <p>20 the right to say, no, I'm not going to pay a civil</p> <p>21 penalty and then the government has the right to file</p> <p>22 a lawsuit against it to resolve the issue of whether</p>
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<p>1 early information about a potential hazard and a</p> <p>2 recall is necessary, is what I said there.</p> <p>3 Q. And the Commission --</p> <p>4 A. And it's talking in the context of the</p> <p>5 recall. The sooner we get the recall in place, then</p> <p>6 you can reduce the -- potentially reduce the injuries</p> <p>7 that might occur.</p> <p>8 Q. And the Commission can't decide whether a</p> <p>9 recall is necessary until it knows about the problem,</p> <p>10 right?</p> <p>11 A. That's right.</p> <p>12 Q. And the earlier the Commission knows about</p> <p>13 a potential problem, the more likely it is that the</p> <p>14 Commission, through a recall or some other way, can</p> <p>15 avoid injuries, right?</p> <p>16 A. Right. But you can't read out of the</p> <p>17 statute when the reporting obligation is triggered.</p> <p>18 And as I say in my report and what you seem to be</p> <p>19 suggesting is that this is an incident-reporting</p> <p>20 statute and it's not an incident-reporting statute.</p> <p>21 You don't have to report to the Commission just</p> <p>22 because you have incidents with a product. Those</p>	<p>1 there was a reporting obligation.</p> <p>2 Q. Do you know all information that Spectrum</p> <p>3 had in its possession in early 2009 relating to the</p> <p>4 carafe handle failures?</p> <p>5 A. No.</p> <p>6 Q. So is your testimony simply that if</p> <p>7 Spectrum were correct that the risk in that case was</p> <p>8 the same as the risk in the PI cases, that Spectrum</p> <p>9 was reasonable in not reporting?</p> <p>10 A. I don't know if it would have to be the</p> <p>11 same. The information should be similar. I don't</p> <p>12 know all the information that Spectrum had that it</p> <p>13 evaluated and considered and determined, based on</p> <p>14 that information, it did not have a reporting</p> <p>15 obligation.</p> <p>16 Now, again, it did report. Of course the</p> <p>17 government thinks it was late. It says it was</p> <p>18 reported for reasons other than safety.</p> <p>19 Q. Timeliness is the issue in this case,</p> <p>20 right?</p> <p>21 A. Yes.</p> <p>22 Q. So I'm just trying to clarify, when you</p>

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<p>1 state that Spectrum did not have a reporting      2 obligation, you did not actually undertake the kind      3 of factual analysis that the company would be      4 expected to take under the law in order to reach that      5 determination?</p> <p>6 A. I say based on the documents that I      7 reviewed.</p> <p>8 Q. And assuming that those documents are      9 complete, then you say Spectrum didn't have to      10 report, right?</p> <p>11 A. Right.</p> <p>12 Q. But you don't know all the information      13 that Spectrum had, right?</p> <p>14 A. That's right.</p> <p>15 Q. And you don't know whether Spectrum's      16 decision makers even considered this issue in 2008 or      17 2009, do you?</p> <p>18 A. I don't know that specifically, that's      19 right. And I say that, that I'm relying on what      20 Nigel Stamp told me, the information that the legal      21 division, legal department uses to determine whether      22 it has a reporting obligation to CPSC.</p>	<p>1 AFTERNOON SESSION      2 (1:34 p m )</p> <p>3 MR ROSS: We're back on the record having      4 just gotten back from lunch. We're looking at      5 Exhibit 85 which is Mr Schoem's second expert      6 report</p> <p>7 EXAMINATION BY COUNSEL FOR PLAINTIFF (RESUMED)</p> <p>8 BY MR ROSS:</p> <p>9 Q. Would you please turn to page 5 of your      10 report? We are still in the background section about      11 the CPSC</p> <p>12 A. Okay</p> <p>13 Q. Now, section B talks about Office of      14 Compliance organizational structure and      15 responsibilities, right?</p> <p>16 A. Yes</p> <p>17 Q. And in the third paragraph of that      18 section, you reference the April 1st, 2002 Office of      19 Compliance Recalls &amp; Compliance Division's Section 15      20 procedures manual. Do you see that?</p> <p>21 A. Yes</p> <p>22 Q. Now, that document came into being while</p>
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<p>1 Q. Can we turn back to Exhibit 85? I'm done      2 with this one now.</p> <p>3 MR. MULLIN: Do you want to take a lunch      4 break?</p> <p>5 MR. ROSS: Yes.</p> <p>6 (Whereupon, at 12:46 p m., the deposition      7 in the above-entitled matter was recessed, to      8 reconvene at 1:34 p.m., this same day.)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 you were the head of Compliance, right?</p> <p>2 A. Yes.</p> <p>3 Q. Did you have a role in drafting that      4 document?</p> <p>5 A. I don't think I drafted it. I'm sure I      6 reviewed it.</p> <p>7 Q. And you reviewed it to make sure that it      8 was consistent with what the Office of Compliance      9 should be doing in those kinds of cases?</p> <p>10 A. Generally, yes.</p> <p>11 Q. I mean, if it contained something that was      12 really objectionable to you, would you have had the      13 ability to change it?</p> <p>14 A. I would have had the ability if I      15 recognized that it was something that was      16 objectionable.</p> <p>17 Q. Before we move on, I just want to cover      18 two quick clarifying questions. The first is I      19 noticed in Attachment 1, in the cases that you      20 considered, you didn't actually list PI 050023, Home      21 Cafe. Did you review that file?</p> <p>22 A. Where are you looking?</p>

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<p>1       Q. In your Attachment 1, I didn't see 2 PI 050023. 3       A. If it's not there, it's certainly an 4 oversight since I talk about it in my report. 5       Bear with me while I find the attachment. 6 It should be there. It should have been in there. 7       Q. You did review that case file? 8       A. I did. 9       Q. And it's consistent with your recollection 10 that that consisted of no more than a handful of 11 documents? 12      A. 23 was the Judy Hayes case, if I'm not 13 mistaken, and so the documents I looked at were the 14 exhibits to her deposition. 15      Q. And other than the ones that were attached 16 as exhibits to the deposition, you didn't look at any 17 other exhibits from that case? 18      A. I don't recall that I received any others. 19 I might have to go back and check my file. I think 20 there was some other ones that I received but I don't 21 recall. I have to look at my file. 22      Q. So just so I'm clear about what exactly</p>	<p>1       that 0023 case along with all of the documents that 2 Spectrum had provided to CPSC and, based on all of 3 those documents, reach a conclusion, the same 4 conclusion that the staff reached, that the risk of 5 injury presented by that coffee maker didn't rise to 6 the level of a substantial hazard. 7       Q. I'm not trying to be tricky about this. 8 Again, I'm just trying to understand exactly what 9 your opinion means. You're saying that Spectrum had 10 the right to review all the information from both 11 cases and compare them in determining whether it had 12 a reporting obligation, right? 13      A. Yes. Those -- it could look at those two 14 cases plus all the information, the other information 15 that it had in the current case and make its decision 16 as to whether it believed it had a reporting 17 obligation. 18      Q. And when you opine at the end that 19 Spectrum did not have an obligation to report, my 20 question is, are you assuming that Spectrum undertook 21 that analysis and that that analysis in fact showed 22 that the cases were similar, or did you undertake</p>
<p style="text-align: center;">Page 159</p> <p>1       you are opining about here, when you say that 2 Spectrum did not have a reporting obligation based on 3 this prior case, you did not undertake the kind of 4 factual analysis of this case that Spectrum would be 5 expected to under the regulations, did you? 6       A. I only looked at the documents that I 7 reflect in my report, except for 0023 which should 8 have been added. 9       Q. And the documents in 0023 that you 10 reviewed were the handful of ones that were attached 11 to exhibits to Judy Hayes' deposition transcript, 12 right? 13      A. Yes. There may have been a few others but 14 I would have to look at my file. 15      Q. So what I'm trying to understand is are 16 you saying that Spectrum in fact reasonably relied on 17 the decision in that prior case based on its 18 analysis, or are you saying that if Spectrum 19 undertook that analysis and it showed that the cases 20 were similar, then it reasonably relied? 21      A. I'm saying that Spectrum had the right to 22 rely on the letter that it received from the staff in</p>	<p style="text-align: center;">Page 161</p> <p>1       that kind of factual analysis yourself? 2       A. I did not undertake that factual analysis 3 myself. I am saying that Spectrum could do that 4 analysis and it would be reasonable for them to reach 5 the conclusion that they didn't have a reporting 6 obligation, but I didn't do that analysis. 7       Q. Okay. I understand. So you're saying 8 that Spectrum could or had the right to do that kind 9 of comparison. That's the basis of your testimony 10 today? 11      A. That and the documents that I reviewed, 12 which indicate that there wasn't the significant risk 13 presented by the product in this case based on my 14 cursory review of some number of the -- I don't know 15 if it's 1,200 or 1,500 complaints that were in the 16 files that I looked at. 17      Q. And just it's helpful to clarify these 18 things sometimes. 19      A. Sure. 20      Q. So that we're not talking past each other 21 for the next two hours. 22           Would you please turn to page 7 and 8 of</p>

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<p>1        your expert report, Exhibit 85? In this section,  2        you're discussing conventional versus Fast Track  3        reporting, right?</p> <p>4        A. Yes.</p> <p>5        Q. And the main difference between those two  6        is that in a Fast Track case, there is no staff  7        determination of whether a substantial product hazard  8        exists, right?</p> <p>9        A. Yes. Correct.</p> <p>10      Q. And do you know, in 2005 to 2008, whether  11        preliminary determinations were made in PI cases?</p> <p>12      A. The 0023 that we're talking about and  13        the --</p> <p>14      Q. Well, I'm sorry, let me step back so that  15        we're not getting off track. Do you know what CPSC  16        policy was about whether preliminary determinations  17        were made in PI cases?</p> <p>18      A. If the staff believed that it was going to  19        lead to more, they would convert the PI to a CA case  20        and all CA cases were supposed to go to preliminary  21        determination panels.</p> <p>22      Q. But before the conversion happened, the</p>	<p>1        MR. MULLIN: I'm going to object to the  2        form of the question. But you can answer.</p> <p>3        THE WITNESS: The box that's checked on  4        that form I believe is the one that says preliminary  5        staff determination. Judy Hayes in her deposition  6        said that it wasn't a formal preliminary  7        determination because there hadn't been a preliminary  8        determination panel but that these were her  9        conclusions. And when I say that it was more form  10       over substance, there is no difference between that  11       document and one that would be signed off on through  12       a preliminary determination panel other than who the  13       signatories were.</p> <p>14      Q. What is the purpose of making a  15        preliminary determination in a conventional case?</p> <p>16      A. It's to present the staff's opinion that  17        the risk presented rises to the level of a  18        substantial product hazard that would warrant a  19        product recall.</p> <p>20      Q. So the CPSC can't pursue a recall in a  21        conventional report unless that determines  22        preliminarily that a substantial product hazard</p>
<p style="text-align: center;">Page 163</p> <p>1        panel doesn't convene and actually consider the case,  2        right?</p> <p>3        A. They don't have to. I think they could.  4        They could convene -- I believe they could convene,  5        at least when I was there, to decide whether to make  6        it a CA case.</p> <p>7        Q. And in this case, actually the PI case  8        that we're referring to, the Applica case, you've  9        seen the document that is written on a preliminary  10       determination form, right?</p> <p>11      A. Yes.</p> <p>12      Q. And so I'm clear, is it your determination  13        that that is an actual preliminary determination or  14        something else?</p> <p>15      MR. MULLIN: I want to object to the form  16        of the question. You can answer.</p> <p>17      MR. ROSS: Let me rephrase it to him  18        because that's a fair objection.</p> <p>19      BY MR. ROSS:</p> <p>20      Q. Do you know whether the CPSC considered  21        that to be a preliminary determination at the time  22        they made it?</p>	<p style="text-align: center;">Page 165</p> <p>1        exists, is that what you're saying?</p> <p>2        A. I think the staff could pursue without  3        making a preliminary determination. It would be  4        inconsistent with the general procedures. But when I  5        was there, what the staff would do, and even after I  6        left, is the staff would go to companies and say, we  7        will forgo making a preliminary determination if  8        you'll agree to do a recall. And they would give  9        those cases a wide designation because the thinking  10       was, if we can get a company to agree to do a recall  11       without making a preliminary determination, then we  12        may not have to do as much work, technical and other  13        work, as we would otherwise have to do.</p> <p>14      So it was a vehicle that the staff used to  15        convince companies to do recalls. It was the carrot  16        that the staff would hold out to a company. We won't  17        make a PD if you agree to do a recall.</p> <p>18      Q. You state in here that the CPSC would  19        disclose to the subject firm whether a substantial  20        product hazard was found but not disclose the hazard  21        classification, right?</p> <p>22      A. Correct.</p>

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<p>1       Q. And other than a cursory description of 2 the risk, like in the letter that we saw earlier, the 3 CPSC doesn't disclose sort of the bases of the 4 determination as set forth in a PD form, right?</p> <p>5       A. Right.</p> <p>6       Q. And that was true from 1997 to 2004 when 7 you ran Compliance, wasn't it?</p> <p>8       A. Yes.</p> <p>9       Q. And that's true today?</p> <p>10      A. Yes.</p> <p>11      Q. And it's been true in all the years 12 between 2004 and 2016?</p> <p>13      A. That's true.</p> <p>14      Q. Would you please turn to page 11 of your 15 report? You make a statement here that I would like 16 to understand where you say, "The CPSC's regulations 17 on the reporting requirement are general in nature." 18       What did you mean by that?</p> <p>19      A. Where are you looking, just so I can be on 20 the same page as you, on the same line.</p> <p>21       MR. MULLIN: The second paragraph, first 22 sentence.</p>	<p>1 products involved, look at the vulnerability of the 2 population. Take all that information, evaluate it 3 and then determine whether you have a reporting 4 obligation.</p> <p>5       Q. The Commission from time to time publishes 6 settlement agreements in the Federal Register, right?</p> <p>7       A. Yes.</p> <p>8       Q. And although the subject firm oftentimes 9 denies the allegations, the staff will set forth what 10 violations it believed occurred, right?</p> <p>11      A. Yes.</p> <p>12      Q. Now, is that an example, just as a general 13 matter, of the kind of notice the Commission can give 14 on whether it thinks that certain kinds of failures 15 and hazards are reportable?</p> <p>16      A. Yes.</p> <p>17      Q. And you agree it would be helpful if 18 you're a consumer products manufacturer if there was 19 a settlement agreement out there that said that, you 20 know, the specific kind of product you're selling is 21 reportable in certain circumstances?</p> <p>22      A. Yes. But I'm also saying that the</p>
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<p>1       BY MR. ROSS:</p> <p>2       Q. There we go. "The Commission's 3 interpretative reporting rule is general in nature 4 identifying criteria firms should consider in 5 determining whether they have a reporting obligation, 6 and identifying the type of information that firms 7 should consider." Do you see that?</p> <p>8       A. Yes.</p> <p>9       Q. What do you mean by general in nature?</p> <p>10      A. Well, let me contrast it to the 11 Commission's interpretation of what a defect is. In 12 defining defect, the Commission gives specific 13 examples of problems with the product that they would 14 consider to be a defect or not to be a defect. In 15 the case of reporting, the Commission doesn't give 16 specific examples in saying if you have this type of 17 risk, we think it is clearly reportable. 18       Instead they give criteria. Look at 19 engineering information, look at consumer complaints, 20 look at incident information, evaluate all of this 21 information, look at the likelihood of injury, look 22 at the pattern of defect, look at the number of</p>	<p>1       Commission could be more affirmative in giving out 2 information on product categories, for example. If 3 the Commission thinks that scalds are a problem with 4 coffee makers, you could put out information that 5 says that or you could disclose sanitized versions of 6 preliminary determination forms or letters to give 7 industries a better idea of what the Commission is 8 looking for and how the Commission feels about 9 particular product issues.</p> <p>10      Q. I'm sorry, I forgot to mention something 11 earlier as one of the preliminary matters. You said 12 that the chart you reviewed of coffee maker cases in 13 the last 10 years omitted a case. What case was 14 omitted?</p> <p>15      A. There was one case that was listed on 16 there that there didn't seem to be any files for.</p> <p>17      Q. Oh, I see. I see.</p> <p>18      A. It wasn't that -- I wouldn't know whether 19 you omitted a case on that chart that should have 20 been on there, but there was one -- at least one case 21 that was on there where I didn't see any documents.</p> <p>22      Q. Okay. Just making sure.</p>

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<p>1        A. I didn't mean to impugn what you --</p> <p>2        Q. No, you weren't. We're apart on that one.</p> <p>3        I just wanted to make sure it was complete.</p> <p>4        Now, when you're talking about things the</p> <p>5        Commission affirmatively could do to provide more</p> <p>6        guidance to industry, you're not suggesting that the</p> <p>7        Commission is legally required to do so, right?</p> <p>8        A. No. I'm suggesting it's good government.</p> <p>9        As you brought out earlier, I was with the Commission</p> <p>10      for 31 years. I've been outside the Commission for</p> <p>11      12 years now. And in that 12 years, I've just</p> <p>12      learned a lot. I was always a government employee,</p> <p>13      as are many of the compliance staff at CPSC and many</p> <p>14      of the employees of CPSC are government employees and</p> <p>15      so you don't have an appreciation or understanding of</p> <p>16      what companies do and what they go through.</p> <p>17      And what I've found is that companies</p> <p>18      generally want to know what the rules and -- what are</p> <p>19      the rules? Tell me what I have to do. If A, then B,</p> <p>20      as opposed to look at all this information and make</p> <p>21      your decision as to whether you should report,</p> <p>22      understanding that you're subject to being</p>	<p>1        hazard.</p> <p>2        Q. And this is an opinion you've come to</p> <p>3        since you've left the government?</p> <p>4        A. Yes.</p> <p>5        Q. Because this is not the way that you ran</p> <p>6        Compliance when you were the head of Compliance, was</p> <p>7        it?</p> <p>8        A. No. If I ever went -- if I were back in</p> <p>9        the Office of Compliance now, I would advocate for</p> <p>10      disclosing more information sanitized so that the</p> <p>11      companies would better understand what the Commission</p> <p>12      believes their responsibilities are.</p> <p>13      Q. And so with respect to this case, you're</p> <p>14      suggesting that what the CPSC should do, although</p> <p>15      it's not really required to, is publish something in</p> <p>16      the Federal Register about coffee scalds and risks of</p> <p>17      that nature?</p> <p>18      A. They don't have to publish it in the</p> <p>19      Federal Register. They could just make information</p> <p>20      available to companies. In this case, Spectrum had</p> <p>21      available to it the Commission staff's decision in</p> <p>22      the two PI cases where Spectrum knew what the</p>
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<p>1        second-guessed by the Commission staff as to whether</p> <p>2        you should or shouldn't have reported now or earlier;</p> <p>3        that I think the Commission could be much more</p> <p>4        helpful to companies if they're sincere in wanting to</p> <p>5        assure the companies report when they're required,</p> <p>6        legally required to do so, is give out as much</p> <p>7        information as you can about product risk for</p> <p>8        different product areas and say, as they've done with</p> <p>9        the new authority that they got in 2008 in the</p> <p>10      Consumer Product Safety Improvement Act, where they</p> <p>11      can now publish in the Federal Register basically</p> <p>12      preliminary determinations of hazard for certain</p> <p>13      product areas.</p> <p>14      As I've said, they've done it for</p> <p>15      outerwear cords on children's outerwear saying,</p> <p>16      you've got cords on outerwear? We've preliminarily</p> <p>17      determined it's a substantial product hazard.</p> <p>18      They've just recently -- and I won't go into whether</p> <p>19      I think it's appropriate or not but they did it for</p> <p>20      hover boards. They essentially preliminarily</p> <p>21      determined that if you've got hover boards with</p> <p>22      lithium ion batteries, it's a substantial fire</p>	<p>1        incidents were, and Spectrum made -- in response to</p> <p>2        staff's requests, Spectrum made reports to the</p> <p>3        Commission where they set forth all of the incident</p> <p>4        information that they had. They knew that the</p> <p>5        Commission had all of that information because of</p> <p>6        whatever else they gave them in the full report, the</p> <p>7        Commission staff had evaluated that information and</p> <p>8        reached the conclusion that the product didn't rise</p> <p>9        to the level -- the risk didn't rise to the level of</p> <p>10      a substantial hazard.</p> <p>11      So I'm just suggesting that if Spectrum</p> <p>12      had had access to even the class B determination in</p> <p>13      the other case that we talked about plus the other</p> <p>14      preliminary determinations where the staff concluded</p> <p>15      the risk did not rise to the level of a substantial</p> <p>16      hazard, that Spectrum or any other coffee maker could</p> <p>17      use that information to help inform it as to whether</p> <p>18      the Commission thought there was a reporting</p> <p>19      obligation in these cases. I'm just saying that the</p> <p>20      more transparent the Agency is, the more helpful it</p> <p>21      would be to companies in determining whether they</p> <p>22      have a reporting obligation.</p>

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<p>1       Q. And if the CPSC was more transparent in      2       publicly disclosing things that should be reported,      3       you're saying that firms wouldn't have to try to read      4       the tea leaves in these letters that they receive      5       from the Commission that don't always explain the      6       bases of the decisions, right?</p> <p>7       A. Well, the company who receives the letter      8       isn't so much reading the tea leaves, but every other      9       company doesn't even get to see the tea leaves.      10      Because Spectrum got to see a letter that at least --      11     in Spectrum's case, it doesn't really matter how      12     general the letter was saying we've concluded there      13     is no substantial product hazard because Spectrum      14     knew what information it had given the Commission and      15     so it at least knew -- didn't necessarily know what      16     other information the Commission had but knew what      17     information it had given the Commission.</p> <p>18      Q. No, but what I'm trying to understand is,      19     because lots of companies out there get letters from      20     the CPSC about various matters, right?</p> <p>21      A. Sure.</p> <p>22      Q. And so is having public guidance a way to</p>	<p>1       A. Yes.</p> <p>2       Q. I want to clarify exactly what you're      3       saying here. Is there, in the CPSA, a statement that      4       says a firm that reasonably believes it doesn't have      5       to report doesn't have an obligation to do so?</p> <p>6       A. No. What I said is the Commission is free      7       to second-guess or disagree with a company's decision      8       not to report, as is done in this case; that the      9       reporting obligation doesn't say you have to report      10      every incident. It says you have to report a defect      11      that could create a substantial risk of injury to the      12      public or an unreasonable risk of serious injury or      13      death.</p> <p>14      If the information you have doesn't meet      15      that criteria, you're not obligated to report to the      16      Commission. And if a company believes that the      17      information it has doesn't obligate it to report to      18      the Commission, then it doesn't have to report,      19      subject to the Commission coming in at some later      20      time and saying, you know, we've looked at all that      21      same information, however the Commission gets it,      22      through a preliminary investigation where they send a</p>
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<p>1       sort of harmonize the expectations of the industry so      2       that you don't have different companies with      3       different expectations based on the information they      4       have?</p> <p>5       A. I think that would be helpful. And you      6       look at -- you know, even a hazard classification      7       that the Commission uses, the recall handbook says      8       that that's intended to promote consistency in      9       decision making within the Commission, and that's so      10      that one compliance officer doesn't look at virtually      11      identical information that another compliance officer      12      is looking at and reaching different conclusions.</p> <p>13      Q. At the bottom of page 11 -- are you on 11      14      now?</p> <p>15      A. Yes.</p> <p>16      Q. You state at the bottom, "If a firm      17      reasonably believes the information it has does not      18      reasonably support the conclusion that a product      19      could create a substantial product hazard or an      20      unreasonable risk of serious injury or death, the      21      information would not be reportable under 15 U.S.C.      22      2064(b)," right?</p>	<p>1       letter out to a company that says please give us all      2       the information, give us full report information.      3       The Commission is then free to say we disagree with      4       the conclusion you've reached, company, on not      5       reporting, and we think you should have reported it      6       and therefore we want a penalty from you.</p> <p>7       And the company is free to say, we      8       disagree, we don't think we had a reporting      9       obligation and we don't want to pay a penalty and      10      then end up in federal court.</p> <p>11      Q. I don't want to get too off track here.      12      That wasn't exactly what I was asking.</p> <p>13      My question is, does the CPSA state that      14      firms don't have to report as long as they have a      15      reasonable basis for reaching that conclusion?</p> <p>16      A. The statute says if you obtain information      17      reasonably supporting a conclusion that there is a      18      defect that could create a substantial product hazard      19      or creates an unreasonable risk of serious injury or      20      death, you're required to report.</p> <p>21      Q. So what --</p> <p>22      A. If you don't meet that criteria, then I</p>

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<p>1 don't believe the company is required to report.</p> <p>2 Q. These are often fact-intensive</p> <p>3 determinations under the legal standard, right?</p> <p>4 A. These are fact determinations, yes.</p> <p>5 Q. And they're under a legal standard that's</p> <p>6 in a statute, right?</p> <p>7 A. Yes.</p> <p>8 Q. And it's interpreted by regulations,</p> <p>9 right?</p> <p>10 A. Yes, by regulations or by courts.</p> <p>11 Q. And in that process, is it possible that</p> <p>12 reasonable minds could differ as to the existence of</p> <p>13 a reporting obligation in a given case?</p> <p>14 A. Sure. That's probably why this case is in</p> <p>15 litigation. Reasonable minds have differed.</p> <p>16 Q. Well, what I'm trying to understand is, if</p> <p>17 there is a reasonable argument for reporting and a</p> <p>18 reasonable argument against it, under the law, does a</p> <p>19 firm have to report in that situation?</p> <p>20 A. I can repeat my answer. If the firm</p> <p>21 believes that the information it has obtained does</p> <p>22 not reasonably support the conclusion that there is a</p>	<p>1 hazard, et cetera, then it has to report, right?</p> <p>2 A. If a product has a defect that could</p> <p>3 create a substantial product hazard, then they have</p> <p>4 to report.</p> <p>5 Q. So is the meaning of that language as long</p> <p>6 as there is a reasonable conclusion that can be drawn</p> <p>7 that the product contains a defect that could create</p> <p>8 a substantial product hazard, that the firm has to</p> <p>9 report?</p> <p>10 MR. MULLIN: Object to the form of the</p> <p>11 question, but you can answer.</p> <p>12 THE WITNESS: Repeat the question again so</p> <p>13 that I understand it.</p> <p>14 BY MR. ROSS:</p> <p>15 Q. My question is, as long as there is some</p> <p>16 reasonable conclusion that could be drawn that the</p> <p>17 product contains a defect that could create a</p> <p>18 substantial product hazard, need a firm report in</p> <p>19 that circumstance?</p> <p>20 A. I guess it depends. If the firm</p> <p>21 reasonably believes that the information does not</p> <p>22 reasonably support the conclusion there is a defect</p>
<p style="text-align: center;">Page 179</p> <p>1 defect that could create a substantial hazard or</p> <p>2 creates an unreasonable risk of serious injury or</p> <p>3 death, it's not required to report to the Commission.</p> <p>4 Q. My question is, is the firm absolved of</p> <p>5 liability when the government comes and investigates</p> <p>6 the issue as long as the firm's initial determination</p> <p>7 was reasonable?</p> <p>8 A. It's a question of whether there would be</p> <p>9 a knowing violation in that case, I suppose, and</p> <p>10 there can be disagreement between the government and</p> <p>11 the company as to whether the company's evaluation</p> <p>12 assessment was reasonable. And that's what courts</p> <p>13 are here to decide.</p> <p>14 Q. So to get back to my question -- well,</p> <p>15 let's step back a second. What you were reciting</p> <p>16 before, just a second ago, is the reporting standard</p> <p>17 under Section 15(b), correct?</p> <p>18 A. Yes. That's the statute that companies</p> <p>19 operate under.</p> <p>20 Q. And Section 15(b) says if a firm obtains</p> <p>21 information which reasonably supports the conclusion</p> <p>22 that a product could create a substantial product</p>	<p style="text-align: center;">Page 181</p> <p>1 that could create a substantial hazard, then it</p> <p>2 doesn't have an obligation to report.</p> <p>3 Q. So the only --</p> <p>4 A. And so the question would be how the firm</p> <p>5 is evaluating that information and how the firm is</p> <p>6 looking at it. If a firm isn't in doubt, if they</p> <p>7 say, we're not in doubt, we don't have a reporting</p> <p>8 obligation, we reasonably believe this information</p> <p>9 does not support the obligation to report because it</p> <p>10 doesn't meet these criteria, then the firm is free to</p> <p>11 not report, and the government is free to say we</p> <p>12 disagree with your decision not to report and we're</p> <p>13 going to sue you if we can't reach an agreement on a</p> <p>14 civil penalty where you don't have to admit</p> <p>15 liability.</p> <p>16 Q. I'm still trying to understand. If there</p> <p>17 is a reasonable argument for reporting and a</p> <p>18 reasonable argument against it, if reasonable minds</p> <p>19 could differ in a situation, under this statute, is a</p> <p>20 firm required to report?</p> <p>21 MR. MULLIN: Object to the form of the</p> <p>22 question.</p>

<p style="text-align: center;">Page 182</p> <p>1        THE WITNESS: Not if the firm reasonably 2     believes that the information doesn't lead to the 3     conclusion that there is a defect that could create a 4     substantial product hazard. 5     BY MR. ROSS: 6        Q. So as long as the firm has a reasonable 7     belief that it doesn't have to report, then it 8     doesn't have to report, period? 9        A. The firm takes the chance that the 10    Commission will disagree with its decision not to 11    report. 12       Q. And in that situation, the Commission can 13    take the firm to court to determine whether or not 14    there was a -- you know, the firm could reasonably 15    conclude, or there is information which reasonably 16    supports the conclusion that the product contains a 17    defect which could create a substantial product 18    hazard, right? 19       A. Yes. 20       Q. So the fact that the firm might have 21    thought initially that its reasoning was reasonable 22    does not immunize it from a potential civil penalty</p>	<p style="text-align: center;">Page 184</p> <p>1     creates an SPH and thus is reportable. Do you see 2     that? 3       A. Yes. 4       Q. And then you say, "However, the Commission 5     has not been transparent with the regulated industry 6     about this body of evidence," right? 7       A. Yes. 8       Q. And basically what you're saying there is 9     the Commission has not in some way publicized data on 10    different preliminary determinations it makes? 11       A. Yes. 12       Q. And, again, that's consistent with how the 13    CPSC has done business forever, right? 14       A. I wouldn't say forever. I think in the 15    early days of the Commission, reports were made 16    public. This was before there was a prohibition on 17    disclosing information reported under Section 15. 18       And I believe the preliminary determination forms 19    were made public and when I was the director of 20    Compliance, we did give out PDs I believe on some 21    occasions in response to FOIA requests. 22       So I can't say forever but generally the</p>
<p style="text-align: center;">Page 183</p> <p>1     suit, right? 2       MR. MULLIN: Object to the form of the 3     question. 4       THE WITNESS: Right. 5     BY MR. ROSS: 6        Q. The firm just makes the determination that 7     it makes and then courts and the Commission and the 8     Department of Justice after the fact get together 9     and, under the law, decide whether the firm met the 10    standard? 11       A. Right. And ultimately a court will 12    decide. As I said, I used the term second-guess but 13    the government is free to disagree with a company's 14    decision not to report. 15       Q. Can you turn to page 12, please? The top 16    paragraph says, "The CPSC has been making PDs based 17    on information it believes leads to the conclusion 18    that a product presents a substantial product hazard 19    or does not present a substantial product hazard for 20    more than 35 years." And you go on to say the staff 21    has a well-developed body of evidence of specific 22    information that it has preliminarily determined</p>	<p style="text-align: center;">Page 185</p> <p>1     attorneys would want the PD form withheld because 2     they didn't want the company to see either risk 3     assessment that the Agency had conducted for its 4     product because they were afraid that if they ended 5     up litigating, they didn't want to have to give this 6     document out too early. 7       Q. But the Commission, when you were the head 8     of Compliance, didn't publicize data; it sort of 9     aggregated these decisions so that companies could 10    see trends in how the CPSC made preliminary 11    determinations, right? 12       A. Unfortunately, that's correct. 13       Q. And this is something that you've learned 14    after the fact? 15       A. This is something I've learned from 16    12 years outside the Commission working with lots of 17    different companies in lots of different product 18    areas. 19       Q. I would like to show you what's previously 20    been marked as Government Exhibit 72. If you would 21    kindly turn to the page that ends in 16475. 22       Well, first of all, this is the Section 15</p>

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<p>1 manual that was in place when you were the head of      2 Compliance, right?</p> <p>3 A. Yes.</p> <p>4 Q. And this is the one that you said that you      5 had input in and perhaps could have changed if you      6 saw something objectionable?</p> <p>7 A. Right, I probably reviewed it at the time.</p> <p>8 Q. Now, this is a section on timeliness of      9 reporting, and there is a bullet that says, "Whether      10 companies believe, or do not believe, the product      11 actually presents a substantial hazard is not the      12 issue in reporting. Companies are required to report      13 at an early stage of the evaluative process. (Have      14 they received information that would cause a      15 reasonable company to think a defect could create a      16 substantial hazard?)" Do you see that?</p> <p>17 A. Yes.</p> <p>18 Q. What's the meaning of this paragraph?</p> <p>19 A. It means that the reporting obligation is      20 broader than the obligation to conduct a recall,      21 because the reporting obligation is if you obtain      22 information reasonably supporting the conclusion that</p>	<p>1 substantial hazard because the Commission has already      2 decided it doesn't create a substantial hazard.</p> <p>3 It's kind of like going around and around      4 but if the Commission advises the company that a      5 product does not present a substantial product hazard      6 and you've got a factual scenario where the risk is      7 significantly lower than in the case where the      8 Commission staff says the product doesn't or a risk      9 doesn't present a substantial product hazard, then I      10 don't think you've reached the "could create"      11 situation. I don't think you've met that criteria.</p> <p>12 Q. And we're talking hypothetically here,      13 right, because you haven't undertaken that analysis      14 in this case, have you?</p> <p>15 A. No, I haven't looked at the -- well, I've      16 looked at the -- I've randomly looked at the incident      17 reports that were involved in this case. I looked at      18 the full report that was provided to the Commission.      19 I've looked at the characterization of the incidents      20 that occurred in this case. I've seen no indication      21 that there were severe injuries or serious injuries.      22 I haven't seen indications of second degree or third</p>
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<p>1 there is a defect that could create a substantial      2 product hazard. The Commission can only compel a      3 recall if it can prove that a defect actually creates      4 a substantial product hazard.</p> <p>5 Q. Now, this paragraph says, "Whether      6 companies believe, or do not believe, the product      7 actually presents a substantial product hazard is not      8 the issue in reporting." Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. So if there is some reasonable argument      11 that a product could create a substantial product      12 hazard based on a defect, must that be reported?</p> <p>13 MR. MULLIN: Object to the form of the      14 question.</p> <p>15 THE WITNESS: If the information meets the      16 criteria for reporting, then the company is obligated      17 to report. But if a company has experience with the      18 Commission and the Commission has concluded that      19 certain risks are just not going to rise to the level      20 of a substantial product hazard, then I don't see      21 that there would be an obligation to report because      22 someone might think that it could create a</p>	<p>1 degree burns as were present in cases where the      2 Commission, in the two Spectrum cases, the two PI      3 cases where there were serious injuries, there were      4 reports of second degree burns. I don't see that      5 present in this case.</p> <p>6 So if Spectrum in fact looked at those two      7 PI decisions where Spectrum knew what the incidents      8 were -- it's not that they had to have that PD form      9 to know what the incidents were. Since it was      10 Spectrum or Applica reporting, they knew what the      11 incidents were. They knew what the risk was. They      12 knew how serious the injuries were, and yet the      13 Commission staff closed those cases and says it      14 doesn't rise to the level of a substantial hazard.</p> <p>15 So if I have a situation in which the risk      16 is much less serious, I wouldn't think -- I think      17 it's reasonable to think that you don't have a "could      18 create" situation.</p> <p>19 Q. Just to be clear, did the CPSC tell      20 Spectrum that coffee spills risking second degree      21 burns cannot be an SPH?</p> <p>22 A. They told Spectrum in the two cases that</p>

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<p>1       they closed that the incidents that had occurred and  2       the risk of injury that was present did not rise to  3       the level of a substantial product hazard.</p> <p>4       Q. So that's not my question, though. My  5       question is, did the CPSC tell the company that in no  6       circumstances in which a coffee maker presents a risk  7       of spilling and second degree burns, that it could  8       never be a substantial product hazard? Is that how  9       you read that letter?</p> <p>10      MR. MULLIN: Object to the form of the  11       question.</p> <p>12      THE WITNESS: They didn't use that  13       specific language.</p> <p>14      BY MR. ROSS:</p> <p>15      Q. They didn't state that language at all,  16       did they?</p> <p>17      A. They stated language that said that the  18       risk doesn't rise to the level of a substantial  19       product hazard.</p> <p>20      Q. The risk in that case, right?</p> <p>21      A. But the risk in -- you can't look at cases  22       in a vacuum. When you're dealing with the same</p>	<p>1       makers, the 1,600 complaints we're talking about in  2       this case, but they did not have the prior experience  3       in the PI case, they couldn't have relied on that  4       document, right?</p> <p>5       A. That's right.</p> <p>6       Q. And a firm in that case would be left to,  7       under your analysis, would be left to interpret its  8       reporting obligation based on the statute and the  9       regulations and other public statements of the CPSC,  10       right?</p> <p>11       A. That's right.</p> <p>12       Q. So could there be a different threshold  13       for reporting for the two companies in this  14       hypothetical, one who had the PI case previously and  15       one who didn't?</p> <p>16       A. Yes, I think that's possible. And I would  17       also think that if the company who didn't have that  18       PI information reported under the conventional  19       reporting program, that the staff would then look at  20       that information and reach a conclusion that there is  21       a defect but it's a class D hazard, doesn't rise to  22       the level of a substantial hazard.</p>
<p style="text-align: center;">Page 191</p> <p>1       company, you expect to have consistency in the  2       decisions that are being made by the compliance  3       staff. That's the reason for the hazard  4       classification. The A, B, C, D, E, in part, it helps  5       inform what corrective action you want to seek from a  6       company, but it also tells the company -- it's also  7       to assure consistency in the decision making by the  8       compliance staff.</p> <p>9       I guess you weren't interested in my  10       answer so I can repeat it if you want.</p> <p>11      Q. So when your testimony is firms should be  12       able to reasonably rely on prior CPSC decisions, as  13       an initial matter, they can only rely on decisions of  14       which they are aware, right?</p> <p>15      A. Right. That's why I encourage the  16       Commission to give out more information and have more  17       transparency so that other companies in similar  18       situations can know what the Commission is thinking.</p> <p>19      Q. So if another company that hadn't had the  20       experience of this PI case, the Brew Basket case, or  21       Home Cafe case -- if another firm had had the  22       problems that Spectrum was having with these coffee</p>	<p style="text-align: center;">Page 193</p> <p>1       If you look at the other nine or ten cases  2       where the staff evaluated very similar information --  3       and the similar information that I'm talking about is  4       hot liquid contacting consumers, in the face, in the  5       arms, in the chest, in the legs. With one exception,  6       the staff routinely, consistently closed those cases  7       saying no substantial product hazard.</p> <p>8       If all those companies got together -- I  9       don't know what the antitrust implications are but if  10       all those companies got together and shared the  11       results of the PD letter that they got saying no  12       substantial product hazard, then they would all be  13       informed and have the same body of knowledge and  14       information to decide -- to use that to factor into  15       their decision whether to report to the Commission.</p> <p>16      Q. Okay. Let's step back about five steps.  17       Got a little far afield of my question there.</p> <p>18       You've answered that the reporting  19       obligation could be different depending on the  20       specific information that any given firm has, right?</p> <p>21       A. Yes.</p> <p>22       Q. And so potentially, in your view, there</p>

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<p>1 are any number of firms out there, all of which are      2 subject to different reporting requirements based on      3 the information that they have known that other      4 companies don't?</p> <p>5 MR. MULLIN: Object to the form of the      6 question.</p> <p>7 THE WITNESS: Every company has to look at      8 the body of information that it has in its      9 possession, look at the past dealings that it's had      10 with the Commission, look at the statutory criteria      11 and make a decision as to whether they have a      12 reporting obligation to CPSC.</p> <p>13 BY MR. ROSS:</p> <p>14 Q. So that's a yes?</p> <p>15 A. So companies who are in different      16 positions could perceive that they have different      17 reporting obligations.</p> <p>18 Q. And is the standard as long as that      19 company has a reasonable argument that it doesn't      20 need to report, that it can't be held liable for the      21 failure to do so?</p> <p>22 A. If the company has reasonable cause to</p>	<p>1 the firm be held liable for not reporting?      2 MR. MULLIN: Object to the form of the      3 question.</p> <p>4 THE WITNESS: That's a decision for the      5 Court, not for me. Isn't that the ultimate decision      6 in this case that the Court has to render?</p> <p>7 BY MR. ROSS:</p> <p>8 Q. I'm asking as a general matter, if      9 reasonable minds could differ and that's the Court's      10 finding, under your understanding of this statute and      11 these regulations, can a firm still be held liable      12 for an untimely report?</p> <p>13 MR. MULLIN: Object to the form of the      14 question.</p> <p>15 THE WITNESS: If the Court finds that the      16 company didn't comply with the reporting obligation,      17 it can be held liable under the statute.</p> <p>18 BY MR. ROSS:</p> <p>19 Q. You opined in this report about Spectrum      20 and its reasonableness in not reporting and whether      21 or not it complied with the reporting obligation.      22 I'm trying to understand what you think the reporting</p>
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<p>1 believe that there is a defect that could create a      2 substantial product hazard, then it's obligated to      3 report. If it doesn't have that information, it      4 doesn't believe that the information rises to that      5 level, then it doesn't have an obligation to report      6 in my opinion. And if the government disagrees, the      7 government can let the company know that it disagrees      8 once it finds out about the issue that the company      9 decided not to report, and the Commission and the      10 company can either resolve it or they can litigate      11 it.</p> <p>12 Q. Now, you said "in my opinion" there. Why      13 did you qualify your statement with "in my opinion"?</p> <p>14 A. Because I'm the one giving the opinion.</p> <p>15 Q. Is your --</p> <p>16 A. I can't speak for anybody else.</p> <p>17 Q. So if at the end of the day the Court says      18 that a firm had a reasonable basis for thinking that      19 this product did not rise to the level of a      20 substantial product hazard but on the other hand      21 reasonable minds could differ and there is a      22 reasonable argument in the other direction too, could</p>	<p>1 obligation means. If a Court says there is a      2 reasonable argument in both directions, under the      3 statute as it exists, can the firm still be held      4 liable for an untimely report?</p> <p>5 MR. MULLIN: Object to the form of the      6 question.</p> <p>7 THE WITNESS: It's going to depend on how      8 the Court rules. I can't answer how the Court rules.      9 It's my opinion in this case that based on the      10 information in the documents that I reviewed, that      11 Spectrum presumably considered, that it reasonably      12 could conclude that it didn't have an obligation to      13 report. The government disagrees with Spectrum's      14 decision not to report before it reported for reasons      15 other than safety. And as a result, they sued      16 Spectrum seeking a penalty and seeking a      17 determination by this court, by the Court, whether      18 Spectrum had an obligation to report.</p> <p>19 BY MR. ROSS:</p> <p>20 Q. I'm not even talking about this case at      21 this point. I'm talking about as a matter of law.      22 As a matter of law, if reasonable minds</p>

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<p>1 could differ and that's the Court's conclusion, that      2 there is a reasonable argument that it could rise to      3 an SPH and there is a reasonable argument that it      4 couldn't, does that absolve the manufacturer of any      5 liability? Is what you're saying that the legal      6 standard is as long as a manufacturer has a      7 reasonable basis for not reporting, it can't be held      8 liable?</p> <p>9       MR. MULLIN: Object to the form of the      10 question.</p> <p>11      THE WITNESS: I'm not giving a legal      12 conclusion. I'm going to leave that to the Court.      13 I'm trying to look at the facts of this case and give      14 my opinion whether, based on those facts, I believe      15 Spectrum had an obligation to report. And I      16 concluded that I didn't believe that they had an      17 obligation to report.</p> <p>18      I'm not giving a legal opinion or a legal      19 conclusion because that's what the Court is going to      20 ultimately do, the Court or a jury.</p> <p>21      BY MR. ROSS:</p> <p>22      Q. Your final conclusion here is, "It is my</p>	<p>1 this product, Commission previous actions with      2 Spectrum, that they made a factual determination that      3 they didn't have to report.</p> <p>4       BY MR. ROSS:</p> <p>5       Q. Would you turn to page -- continuing on to      6 page 12 on Exhibit 85, your report again -- you talk      7 about how a preliminary determination letter is often      8 the only window a firm has into determining whether      9 something is reportable. Do you see that?</p> <p>10      A. Yes.</p> <p>11      Q. Now, it is your opinion in this case that      12 a firm can reasonably rely on the decisions in prior      13 CPSC cases in determining whether a reporting      14 obligation has arisen, right?</p> <p>15      A. Previous cases involving that company.</p> <p>16      Q. Involving that company.</p> <p>17       Is that your opinion or is that the law?</p> <p>18      MR. MULLIN: Object to the form of the      19 question.</p> <p>20      THE WITNESS: That's my opinion and --</p> <p>21       that's my opinion.</p> <p>22      BY MR. ROSS:</p>
<p style="text-align: center;">Page 199</p> <p>1 opinion that Spectrum did not have a reporting      2 obligation to CPSC for its Applica/Black &amp; Decker      3 brand 12-cup coffee makers that are the subject of      4 this litigation." Do you see that?</p> <p>5       A. Right. And it's based on my review of the      6 documents that I identified that I reviewed in this      7 case and my understanding of how Spectrum goes      8 through its process and the documents that Spectrum      9 looked at in determining whether to report.</p> <p>10      Q. And are you saying that you can reach that      11 conclusion without even knowing what the law      12 requires?</p> <p>13      MR. MULLIN: Object to the form of the      14 question.</p> <p>15      THE WITNESS: I'm saying that the law says      16 that if Spectrum obtains information reasonably      17 supporting the conclusion that there is a defect that      18 could create a substantial product hazard, that      19 they're required to report it. Spectrum didn't reach      20 that conclusion. They didn't reach that conclusion      21 because of the nature of the injuries that were      22 occurring, the risk of injury that was present with</p>	<p style="text-align: center;">Page 201</p> <p>1       Q. Does it say in the Consumer Product Safety      2 Act anywhere that CPSC decisions have some sort of      3 precedential value?</p> <p>4       A. No, and it doesn't say that it doesn't      5 have precedential value.</p> <p>6       Q. So it's in the eye of the beholder, is      7 that what you're saying?</p> <p>8      MR. MULLIN: Object to the form of the      9 question.</p> <p>10      THE WITNESS: I'm saying it's reasonable      11 for a company to be treated in a -- and to assume or      12 to presume it's going to be treated in a consistent      13 manner, that it's not going to one day get a letter      14 from a compliance officer that says we've reviewed      15 incident information involving your coffee maker      16 where people had serious injuries, a handful of      17 second degree burns, and we've concluded that that      18 doesn't rise to the level of a substantial product      19 hazard; and then two weeks later get a letter from a      20 different compliance officer involving a different      21 coffee maker that the company makes but with the same      22 risk of injury presented by that product and having</p>

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<p>1 less significant injuries or incidents, and reaching      2 a conclusion that your product has a defect that      3 creates -- that we believe your product has a defect      4 that creates a substantial product hazard, we've      5 classified it as a C and we want you to conduct a      6 recall. Companies are entitled to have some      7 consistency in the decision making by the compliance      8 staff, and that's the reason for the A, B, C, D, E      9 criteria, in part, and so that there is consistency      10 in decision making.</p> <p>11 BY MR. ROSS:</p> <p>12 Q. But it's not your opinion that as a matter      13 of law, a staff determination in one case precludes      14 staff from determining in another case that -- let me      15 take that back.</p> <p>16 If in the first case staff determines that      17 no further action is necessary, is staff precluded as      18 a matter of law from finding differently in future      19 cases on similar facts?</p> <p>20 MR. MULLIN: Object to the form of the      21 question.</p> <p>22 THE WITNESS: Well, they're not -- I mean,</p>	<p>1 product and similar risk patterns, have the -- it's      2 reasonable and right for them to take that      3 information into consideration in deciding whether      4 they have a reporting obligation to CPSC.      5 BY MR. ROSS:</p> <p>6 Q. Are prior cases among the kind of      7 information the regulations state firms should      8 consider in deciding whether to report?</p> <p>9 A. No. And in fact, I specifically say in      10 the report that the interpretative reg is silent on      11 the -- and doesn't take into account the effect that      12 previous cases have. I don't think anybody thought      13 about it when the regulations were originally written      14 back in 1974 or so. There weren't that many cases.</p> <p>15 Q. So this idea of it's reasonable to rely on      16 prior cases is not based on some affirmative      17 statement that the CPSC has said to the public,      18 right? The CPSC -- to clarify, the CPSC has never      19 said if we found one way in a prior case, you can      20 rely on that in future cases?</p> <p>21 A. They've never said that. They've never      22 said lots of things, though.</p>
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<p>1 the staff can do almost anything it wants to do, so I      2 can't say that they're precluded from doing that. It      3 wouldn't be good government. I don't think it would      4 be reasonable.</p> <p>5 I think that the staff -- if the staff      6 does that, then maybe they ought to reopen the other      7 cases where they concluded that the risk didn't rise      8 to the level of a substantial hazard and go seek      9 recalls in all of those other cases. Companies are      10 entitled to be treated consistently, in my opinion.</p> <p>11 BY MR. ROSS:</p> <p>12 Q. So is the point of your opinion here just      13 to state that it's reasonable for companies to assume      14 that if the CPSC decided a case one way, at some      15 point it's going to decide future cases in a similar      16 way?</p> <p>17 MR. MULLIN: Object to the form of the      18 question.</p> <p>19 THE WITNESS: I think a company is      20 entitled to consider, among the other things that      21 it's considering, how the staff, how the Commission      22 has dealt with it in prior cases with the similar</p>	<p>1 Q. Look at the bottom of page 12. You say,      2 "The lack of transparency by CPSC on particular      3 issues it considers to be reportable and that could      4 create a substantial product hazard results in      5 reporting under Section 15 becoming a game of      6 'gotcha' where the Commission second-guesses firm's      7 decisions not to report. This second-guessing might      8 not occur if CPSC were more forthcoming in sharing      9 with firms its decisions on the types of risks that      10 it believes do not rise to the level of a substantial      11 product hazard."</p> <p>12 Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. And that's your opinion?</p> <p>15 A. Yes.</p> <p>16 Q. So how many games of gotcha did you play      17 when you were the head of Compliance?</p> <p>18 MR. MULLIN: Object to the form of the      19 question.</p> <p>20 THE WITNESS: I would like to think we      21 didn't play gotcha when I was at the Commission, that      22 we looked at the information that was available to us</p>

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<p>1 and made reasoned decisions on whether we believed a      2 firm had a reporting obligation. If you look back at      3 the history, we didn't have that many civil penalty      4 cases when I was there. Sure, sometimes I think we      5 touted that we've got, you know, a record amount of      6 penalty this year because the Commissioners and      7 chairmen like to do that, but I would like to think      8 that we were very thoughtful and very careful before      9 we brought civil penalty actions from -- at least      10 when I was the head of Compliance.</p> <p>11 BY MR. ROSS:</p> <p>12 Q. And is it your opinion that today CPSC is      13 neither thoughtful nor careful in bringing civil      14 penalty actions?</p> <p>15 A. I don't think they're as thoughtful and as      16 careful as they were when I was there.</p> <p>17 Q. And what are you basing that on?</p> <p>18 A. I base it on anecdotal information. I      19 base it on some cases I've been involved in. It's a      20 perception that I have from dealing with staff at the      21 Commission.</p> <p>22 Q. So your perception that people like</p>	<p>1 stand here today and say that they're neither      2 thoughtful or not careful compared to the way you did      3 things, right?</p> <p>4 A. I didn't say that. I said I don't think      5 they're as thoughtful. My perception is they're not      6 as thoughtful or as insightful as when I was there.</p> <p>7 Q. And they lack self-confidence, right?</p> <p>8 Isn't that what you said?</p> <p>9 A. I don't think I ever said they lack      10 self-confidence.</p> <p>11 Q. I think you said that they lacked the      12 self-confidence to tell firms about the bases of      13 their decisions in cases. That's what we talked      14 about right before lunch.</p> <p>15 A. I thought I talked about compliance      16 officers not having the self-confidence to tell      17 companies they didn't have to report, but I could be      18 wrong.</p> <p>19 Q. So is it your testimony today that the      20 CPSC cares more about playing games than protecting      21 public safety?</p> <p>22 A. No, I think you're mischaracterizing what</p>
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<p>1 Harriet here just throw darts trying to figure out      2 who to prosecute in these cases?</p> <p>3 MR. MULLIN: Object to the form of the      4 question.</p> <p>5 THE WITNESS: I didn't say that.</p> <p>6 MR. MULLIN: For arrogance sake.</p> <p>7 THE WITNESS: I don't know what Harriet      8 does. I don't know how she evaluates information and      9 I would never throw darts at Harriet.</p> <p>10 BY MR. ROSS:</p> <p>11 Q. The Office of General Counsel, then?</p> <p>12 MR. MULLIN: Object to the form of the      13 question.</p> <p>14 BY MR. ROSS:</p> <p>15 Q. Are they just throwing darts in deciding      16 who to prosecute?</p> <p>17 MR. MULLIN: Object to the form of the      18 question.</p> <p>19 THE WITNESS: I don't know what they're      20 doing.</p> <p>21 BY MR. ROSS:</p> <p>22 Q. But you feel compelled and entitled to</p>	<p>1 I said. I said if the Commission is more transparent      2 in disclosing to firms situations where it thinks      3 product risks either rise to the level of a      4 substantial hazard or don't rise to the level of a      5 substantial hazard, that companies would understand      6 better their reporting obligation to CPSC. Companies      7 can't tell from Commission press releases whether a      8 recall is being conducted because a company reported      9 under Fast Track and there has been no determination      10 of hazard, or whether companies reported under the      11 conventional reporting program and the staff made a      12 preliminary determination and then pursued a recall.</p> <p>13 If the Commission were more transparent in      14 disclosing information about its decisions as to when      15 it believes and the circumstances under which it      16 believes products rise to the level of a substantial      17 hazard or don't rise to the level of a substantial      18 hazard, it would make it easier for companies to      19 fulfill their reporting obligation.</p> <p>20 As I also said, companies in my experience      21 just want to know what the rules of the road are.      22 Lay out for me very clearly in black and white.</p>

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<p>1     Don't tell me what the criteria are that I have to      2     look at. I mean, that's fine. But can you give me      3     some specific examples of when you think you should      4     report? And even if all the examples are you should      5     report, that's okay because you're giving some      6     specific guidance to a company that if these      7     circumstances arise or if these risks arise,      8     regardless of whether we pursue a recall, we think      9     you need to report this information to the      10    Commission.      11       I mean, that's what I've learned from      12      being outside the Commission and working with the      13      companies. When you're in the government, you're      14      working on the other side of companies. When you're      15      outside of companies, you're working with the      16      companies trying to get them to comply with all of      17      the rules and regulations that they're obligated to      18      comply with. And they want to know, what are the      19      rules? Be clear. Be succinct. Tell me what the      20      Commission thinks about this particular risk or that      21      particular risk.      22       Q. I'm going to show you an exhibit that</p>	<p>1     right-hand column, allegations of staff, you'll see      2     in paragraph 4 that this settlement relates to a      3     10-cup automatic coffee maker and replacement      4     carafes. Do you see paragraph 4?      5       A. Yes.      6       Q. So that's fairly similar to a 12-cup      7     automatic coffee maker that we're talking about here,      8     right?      9       A. Yes.      10      Q. In theory?      11       A. Yes.      12       Q. Paragraph 6 states, "The 10-cup automatic      13      coffee maker is a programmable automatic coffee maker      14      with a glass carafe that has a plastic black handle."      15       Now, in our case, we're talking about      16      glass carafes with plastic handles, right?      17       A. Right.      18       Q. "The 10-cup replacement carafe was      19      distributed as a replacement carafe for the 10-cup      20      automatic coffee maker. The carafe's handle can      21      unexpectedly loosen or break, resulting in the carafe      22      failing. If this should occur, consumers may sustain</p>
<p style="text-align: center;">Page 211</p> <p>1     we're going to mark as Government Exhibit 87.      2           (Government Exhibit No. 87 was      3           marked for identification.)      4    BY MR. ROSS:      5       Q. Do you see on May 8th, 2006, notice of      6      settlement published in the Federal Register      7      regarding West Bend Housewares, LLC?      8       A. Yes.      9       Q. Have you seen this document before?      10      A. I don't think I've read it before.      11      Q. Now, if it's in the Federal Register, it's      12      public, right?      13       A. Yes.      14       Q. And if it was published on May 8th, 2006,      15      it was about a year and a half before these coffee      16      makers were manufactured, right?      17       A. Yes.      18       Q. So you were never shown this document in      19      formulating your opinions and you were never aware of      20      it, right?      21       A. Right.      22       Q. Now, if you look at section III in the</p>	<p style="text-align: center;">Page 213</p> <p>1     burn injuries from hot coffee or lacerations from      2     broken glass."      3       Do you see that?      4       A. Yes.      5       Q. So this is another case talking about the      6      plastic handle falling off of a glass carafe      7      potentially causing burns or lacerations, right?      8       A. Yes.      9       Q. Now, if you look at paragraph 7, it says,      10      "The company started receiving reports in October of      11      2004, right?      12       A. Yes.      13       Q. Paragraph 8, "In December 2004, West Bend      14      acquired a couple of samples of broken handles for      15      evaluation. A brief evaluation of these handles      16      revealed a problem with the plastic material and/or      17      the processing. West Bend asked the foreign      18      manufacturer to investigate the breakage problem and      19      to make the necessary corrections."      20       That's paragraph 8, right?      21       A. Correct.      22       Q. In this case, were you aware that Spectrum</p>

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<p>1 received two returned coffee makers and performed an 2 engineering analysis on those coffee makers?</p> <p>3 A. I don't remember the number but I know 4 they performed analysis on returned coffee makers, 5 yes.</p> <p>6 Q. Two, in March and April of 2009 7 respectively, right?</p> <p>8 A. That sounds right.</p> <p>9 Q. And are you aware that the conclusions of 10 those were that there were problems with the plastic 11 material and the processing, among other things?</p> <p>12 A. Yes.</p> <p>13 Q. So that's also similar, right?</p> <p>14 A. Yes.</p> <p>15 Q. And in West Bend, they asked the foreign 16 manufacturer to investigate the problem and to make 17 necessary corrections. And in this case, Spectrum 18 asked the manufacturer to investigate the problem and 19 make necessary corrections, right?</p> <p>20 A. Right.</p> <p>21 Q. So we're still going similar here. 22 Number 9, "On or about February 2, 2005,</p>	<p>1 A. Correct. 2 Q. And here it says at least two reports of 3 minor burns and/or cuts. Now, based on your 4 cursory -- and this is using your word, I don't want 5 to characterize it -- your cursory review of the data 6 in this case, you said that all of the incidents that 7 were reported appeared to be minor, right?</p> <p>8 A. Yes. 9 Q. But there were considerably more than two, 10 right? 11 A. Yes. 12 Q. Many, many multiples more than two, right? 13 MR. MULLIN: Object to the form of the 14 question. 15 BY MR. ROSS: 16 Q. Well, there were approximately 70 in our 17 case and two in this case, right? 18 A. Right. 19 Q. Now, finally, if you look at paragraphs 13 20 through 15, As indicated in paragraph 4, by February 21 2005, West Bend obtained information which reasonably 22 supported the conclusion that the 10-cup automatic</p>
<p style="text-align: center;">Page 215</p> <p>1 the foreign manufacturer advised West Bend that the 2 material used in the handles was not so good. At 3 that time, West Bend retained an outside plastics 4 expert who found that the material used in the broken 5 handle did not meet West Bend's specifications."</p> <p>6 Now, in our case, are you aware that 7 Spectrum determined that there had been a problem in 8 how the coffee makers were being manufactured which 9 led to handle weakness?</p> <p>10 A. Generally, yes.</p> <p>11 Q. Now, if you look at paragraph 12 and skip 12 down a little bit, it says, "West Bend reported to 13 the Commission on or about July 15, 2005." So that's 14 about nine months later, after officially receiving 15 reports, right?</p> <p>16 A. Right.</p> <p>17 Q. "At the time of its report, West Bend had 18 received at least 169 reports of handle breakage and 19 at least two reports of minor burns and/or cuts as a 20 result of the handle breakage."</p> <p>21 Now, the 169 reports is considerably less 22 than we had in this case, correct?</p>	<p style="text-align: center;">Page 217</p> <p>1 coffee maker, item 56870, and its replacement carafe, 2 item 5815, contained a defect which could create a 3 substantial product hazard, but failed to report such 4 information in a timely manner."</p> <p>5 Do you see that?</p> <p>6 A. Yes.</p> <p>7 Q. "14. By failing to furnish information as 8 required by Section 15(b), West Bend violated CPSA." 9 Do you see that?</p> <p>10 A. Yes.</p> <p>11 Q. "15. West Bend committed this failure to 12 timely report to the Commission 'knowingly' as the 13 term 'knowingly' is defined in the CPSA." 14 Do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. And then West Bend gives its response in 17 which it gives the standard denials of all of the 18 CPSC's allegations, right?</p> <p>19 A. Yes.</p> <p>20 Q. Now, we talked earlier about how 21 settlement agreements posted in the Federal Register 22 is some kind of public statement that the CPSC can</p>

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<p>1 give that helps firms determine whether they have to      2 report, right?      3 A. Right.      4 Q. Reviewing this, does this sound like a      5 similar fact pattern to what we have in our case?      6 A. Well, it's a similar fact pattern. West      7 Bend of course denied the allegations. West Bend      8 settled rather than litigating to see what a court      9 would determine. I don't know whether West Bend had      10 received letters from the staff in other cases      11 advising it that the risk, which is worse than this      12 risk, did not rise to the level of a substantial      13 product hazard.</p> <p>14 So in the other two PI cases, there were      15 serious injuries, there were reports of second degree      16 burns and the staff tells Applica/Spectrum that this      17 product doesn't rise to the level of a substantial      18 hazard.</p> <p>19 So companies come in and settle civil      20 penalty cases with the Commission all the time      21 because they don't want to litigate. And as you      22 note, they denied the allegations and you don't know</p>	<p>1 If I were Spectrum, I could sit there and say, well,      2 gee, the Commission must have changed its mind, they      3 thought that -- they alleged that there was late      4 reporting in this case but since this case, they must      5 have changed their minds because now we've gotten two      6 letters from the Commission saying these product      7 risks, severe burns, serious injuries, second degree      8 burns, don't rise to the level of a substantial      9 hazard.</p> <p>10 Q. So it's your testimony that Spectrum could      11 essentially ignore a public statement where the CPSC      12 is saying carafe handle failures, even if it only      13 leads to minor cuts and burns, are reportable?</p> <p>14 MR. MULLIN: Objection to the form of the      15 question.</p> <p>16 THE WITNESS: I didn't say that Spectrum      17 could ignore it.</p> <p>18 BY MR. ROSS:</p> <p>19 Q. So Spectrum should consider it?</p> <p>20 A. Spectrum should consider it.</p> <p>21 Q. But you're saying given the fact that they      22 got letters in other cases, they just can assume that</p>
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<p>1 why they settled. At least I don't know why they      2 settled. I don't know what their thought process was      3 and why they decided not to take their chance in      4 litigation.</p> <p>5 Q. But even though the company denied the      6 allegations, everything that we read in section 3 was      7 under allegations of the staff, right?</p> <p>8 A. Yes, in 2006.</p> <p>9 Q. And what we're talking about is      10 information that firms have that sheds light on what      11 the Commission considers to be a reportable issue,      12 right?</p> <p>13 A. Well, yes and no. Spectrum had      14 information from the Commission in two cases in which      15 there were, in one case, 500 or so reports of      16 incidents. There were serious burn injuries to      17 consumers. There were second degree burns to      18 consumers. If this was the Commission's thinking,      19 then why wouldn't they have converted that from a PI      20 case to a CA case and asked Spectrum to conduct a      21 recall? Why did they close it and say, this doesn't      22 rise to the level of a substantial product hazard?</p>	<p>1 this does not actually state that they should report,      2 right?</p> <p>3 A. I think they take into account the full      4 body of the information that they have and make an      5 informed decision as to whether they believe they      6 have a reporting obligation. And if they've gotten      7 letters from the Commission that says serious burns,      8 scalds, second degree burns do not rise to the level      9 of a substantial hazard and you don't need to take      10 any action, you don't have to recall the product,      11 that that's something that they seriously should take      12 into consideration along with this and any other      13 settlements, because they've been specifically      14 informed by the staff that these risks do not rise to      15 the level of a substantial hazard.</p> <p>16 Q. And by risk, you're talking about      17 injuries, right?</p> <p>18 A. I'm talking about hot water contacting the      19 skin of consumers.</p> <p>20 Q. Which can happen in any number of      21 different ways, right?</p> <p>22 A. It can happen in any number of different</p>

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<p>1 ways but the results can be the same. When hot      2 liquid contacts your skin, a variety of things can      3 happen.</p> <p>4 Q. So the failure mode doesn't matter in      5 assessing risk?</p> <p>6 A. Failure mode is a factor to take into      7 account.</p> <p>8 Q. What I'm trying to understand is, so      9 you're saying Spectrum can decide that even though      10 the CPSC has come out publicly and said carafe handle      11 failures leading to minor burns or cuts are      12 reportable, Spectrum can say, well, because we got a      13 letter in a different case involving a different      14 coffee maker and a different failure mode, we don't      15 have to report?</p> <p>16 A. I think Spectrum can look at the letters      17 that they got because they were specific as to      18 Spectrum products. They can look at the risk that      19 was presented in those two cases which is a lot worse      20 in my opinion than a carafe handle cracking or      21 breaking or splitting. When you've got steam being      22 ejected onto consumers' faces and onto their bodies</p>	<p>1 Q. So you're saying the cases are      2 inconsistent?</p> <p>3 A. I'm saying that the Commission has been      4 inconsistent in its approach to coffee maker burn      5 risks.</p> <p>6 Q. In your view of what a company can      7 reasonably rely on in deciding whether to report, are      8 you saying that notices that that company receives,      9 and that company alone, should be given more weight      10 than public statements to the industry at large?</p> <p>11 A. Well, a public statement in the context of      12 a settlement, I'm not sure how much that means. It      13 gives the staff view in the allegations that they      14 think carafe handle breakage is reportable and if a      15 company doesn't report in a timely manner, the staff      16 believes that that's a violation of the reporting      17 obligation.</p> <p>18 West Bend didn't agree with the staff's      19 conclusions, settled the case, and now Spectrum's got      20 specific information about its coffee makers and how      21 the staff views risk and makes a decision based on      22 the information that it has available. And that's</p>
<p style="text-align: center;">Page 223</p> <p>1 and you've got second degree burns, reports of second      2 degree burns and serious injuries, they'll take that      3 into consideration in deciding whether they have a      4 reporting obligation in the instant case.</p> <p>5 Q. So in your mind, is this just another      6 aberration?</p> <p>7 A. This is a piece of information that      8 Spectrum certainly can take into consideration in      9 deciding whether it has an obligation to report.      10 This is not definitive by any means because it's a      11 settlement.</p> <p>12 Q. And in your mind, it's not a statement by      13 CPSC that it considers carafe handle failures to be      14 reportable?</p> <p>15 A. In this case, the Commission took the      16 position that carafe handle failures in this case      17 were reportable. In other cases, the Commission      18 staff has taken the position that carafe handle cases      19 do not rise to the level of a substantial product      20 hazard and would lead me to conclude that the staff      21 doesn't believe that it's a "could create substantial      22 product hazard" situation.</p>	<p style="text-align: center;">Page 225</p> <p>1 where the government will disagree or disagrees with      2 the conclusions that Spectrum reaches and that's why      3 you're in court with them.</p> <p>4 Q. Do you think that the filing of this      5 lawsuit gives companies notice that the CPSC believes      6 carafe handle failures should be reported?</p> <p>7 A. It gives notice to companies that the      8 Commission staff believes that in this case, Spectrum      9 should have reported these carafe handle failures and      10 we'll find out whether the government is right or      11 whether the company is right at the end of the day.</p> <p>12 Q. So it's specific to the facts of this      13 case? I'm just trying to understand --</p> <p>14 MR. MULLIN: Let him answer your question.</p> <p>15 THE WITNESS: It doesn't have to be      16 specific to the facts of this case. This Spectrum      17 case, the government is saying that it believes that      18 these carafe handle failures were a defect that rose      19 to the level that could create a substantial product      20 hazard and should have been reportable, should have      21 been reported by Spectrum. Spectrum disagrees.</p> <p>22 BY MR. ROSS:</p>

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<p>1       Q. Just quickly, I would like to put in what      2 I'm marking as Government's Exhibits 88 and 89.      3                     (Government Exhibit Nos. 88 and 89      4                     were marked for identification.)</p> <p>5 BY MR. ROSS:</p> <p>6       Q. By the way, do you know whether Spectrum      7 weighed this case in 2012?</p> <p>8       A. Yes.</p> <p>9       Q. I'm talking about West Bend in deciding      10 whether to report.</p> <p>11      A. Did Spectrum weigh the West Bend case? I      12 don't know.</p> <p>13      Q. And do you know --</p> <p>14      A. It's among the litany of things that Nigel      15 Stamp said that the company considers.</p> <p>16      Q. Assuming of course that the company      17 actually did consider, before March 2012, whether      18 they needed to report this issue, right?</p> <p>19      A. Right.</p> <p>20      Q. I mean, because you don't -- just sitting      21 here today, and it's not an accusation, I'm just      22 trying to ascertain a fact -- you don't know whether</p>	<p>1       Q. So if a firm was trying to consider      2 whether it needed to report carafe handle failures,      3 it would be fairly easy for it to go online and find      4 another case in which the CPSC considered this issue,      5 right?</p> <p>6       A. Yes.</p> <p>7       Q. And that's among the information that the      8 firm should consider in deciding whether it should      9 report, right?</p> <p>10      A. Yes.</p> <p>11      Q. And whether the firm ultimately reports is      12 going to depend on other information it has too,      13 right?</p> <p>14      A. Yes.</p> <p>15      Q. And depending on the specific information      16 that that company has based on past dealings with the      17 CPSC, it's your testimony that the obligation to      18 report might arise for some companies but not for      19 others?</p> <p>20      A. It's fact based. Companies have to make a      21 decision whether they believe they have a reporting      22 obligation. It's interesting that there were some</p>
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<p>1 or not the company ever considered, prior to March      2 2012, whether this issue should be reported?</p> <p>3       A. That's right. I said I wasn't privy to      4 their discussions.</p> <p>5       Q. So I've marked Government Exhibits 88 and      6 89 which both relate to the West Bend settlement. Do      7 you see that?</p> <p>8       A. Yes.</p> <p>9       Q. And 88 is a screen shot of the press      10 release that CPSC issues on its website, right?</p> <p>11      A. Looks like it, yes.</p> <p>12      Q. And the CPSC tends to issue press releases      13 when it comes to settlements, right?</p> <p>14      A. Yes.</p> <p>15      Q. So somebody who is online could pull up      16 this fairly easily, right?</p> <p>17      A. Yes.</p> <p>18      Q. And if you look at 89, even today, if you      19 Google -- if you put coffee maker handle into the      20 search bar on the CPSC website, West Bend pops up on      21 the very first page in .03 seconds. Do you see that?</p> <p>22      A. Uh-huh.</p>	<p>1 other -- I don't recall if it was PI or RP cases with      2 carafe handle breakage cases where consumers were      3 being struck with hot liquid. And the staff closed      4 those cases and said it doesn't rise to the level of      5 a substantial hazard.</p> <p>6       And again, how is the company supposed to      7 know where the Commission is coming from if it brings      8 cases in one case, bringing civil penalty actions in      9 one case and in other cases on similar facts or      10 similar risk, it's closing the cases and saying it      11 doesn't rise to the level of a substantial product      12 hazard? That makes it really hard for companies to      13 know what the Commission expects from them.</p> <p>14      Q. Well, you base your analysis on the facts      15 of that particular case, right?</p> <p>16      A. Well, you base it on the facts of that      17 case but I also look at the risk that's presented by      18 the product. If carafe handles are breaking,      19 slipping and hot liquid is spilling, I would think      20 generally at least that the risk is the same in each      21 of those cases, if it's a, you know, counter top      22 coffee maker. It might be a little different than a</p>

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<p>1 space saver coffee maker.</p> <p>2 Q. And is the risk different depending on</p> <p>3 whether the handle separates a little or it falls off</p> <p>4 completely?</p> <p>5 A. It might.</p> <p>6 Q. And is the risk different depending on</p> <p>7 whether 1 in 100 units fails versus 1 in 10,000 units</p> <p>8 fails?</p> <p>9 A. You would look at the likelihood of</p> <p>10 injury, is one of the factors that you would take</p> <p>11 into account, but you're looking more at not whether</p> <p>12 it breaks but what the risk of injury is as a result</p> <p>13 of that breakage.</p> <p>14 Q. So even if a coffee maker breaks 1 in</p> <p>15 10,000 times, if there is a risk of serious injury</p> <p>16 from that, that's something that might be reportable?</p> <p>17 And when I say reportable, I mean it might be</p> <p>18 something that has to be reported?</p> <p>19 A. It might be. Again, you have to take into</p> <p>20 account, not in isolation, but take into account all</p> <p>21 the information that the company has in its</p> <p>22 possession.</p>	<p>1 A. Right.</p> <p>2 Q. This was a Fast Track case, so there was</p> <p>3 no preliminary determination of substantial product</p> <p>4 hazard made, right?</p> <p>5 A. Right.</p> <p>6 Q. And in fact, in none of the cases that</p> <p>7 Spectrum or Applica reported themselves was a</p> <p>8 substantial product hazard found because all those</p> <p>9 cases were Fast Track cases, right?</p> <p>10 A. Right.</p> <p>11 Q. So in a Fast Track case, there can be a</p> <p>12 reporting violation despite the fact that no Fast</p> <p>13 Track cases result in preliminary determinations,</p> <p>14 right?</p> <p>15 A. Right.</p> <p>16 Q. The question is whether the hazard could</p> <p>17 create a substantial product hazard based on the</p> <p>18 defect, right?</p> <p>19 MR. MULLIN: Object to the form of the</p> <p>20 question.</p> <p>21 THE WITNESS: Yes.</p> <p>22 BY MR. ROSS:</p>
<p>1 Q. I'm going to show you a document that I'm</p> <p>2 marking as Government Exhibit 90.</p> <p>3 (Government Exhibit No. 90 was</p> <p>4 marked for identification.)</p> <p>5 BY MR. ROSS:</p> <p>6 Q. Is this among the case files you</p> <p>7 considered, case file RP090279?</p> <p>8 A. If it was on the spreadsheet that you</p> <p>9 provided to Spectrum's counsel and if there were</p> <p>10 documents associated with it, then yes, it's a case</p> <p>11 that I would have looked at.</p> <p>12 Q. Well, I notice it's not listed on your</p> <p>13 materials considered list. Are you certain that you</p> <p>14 looked at this case?</p> <p>15 A. I can't be certain if it's not on my list</p> <p>16 of -- I'm just looking at page 15 where I also listed</p> <p>17 some cases.</p> <p>18 Q. Now, in this case, I'm talking about the</p> <p>19 case that gave rise to the lawsuit at bar, the</p> <p>20 government's allegations in counts 1 and 2 of the</p> <p>21 complaint are that Spectrum failed timely to report</p> <p>22 the issue of the coffee handles, right?</p>	<p>1 Q. And you've testified before that the</p> <p>2 company's dealings with the CPSC in prior cases</p> <p>3 should inform the company's decision of whether to</p> <p>4 report, right?</p> <p>5 A. They should take that into account, yes.</p> <p>6 Q. Now, this letter is dated June 24th, 2010,</p> <p>7 right?</p> <p>8 A. Yes.</p> <p>9 Q. So this would have been almost two years</p> <p>10 before Spectrum reported the coffee makers in this</p> <p>11 case, right?</p> <p>12 A. Right. And I haven't read this letter so</p> <p>13 I'm -- the response to the question is I haven't read</p> <p>14 this letter.</p> <p>15 Q. My question was about date, at least the</p> <p>16 first one. The first paragraph reads -- well, I'm</p> <p>17 going to summarize. The CPSC staff has started an</p> <p>18 investigation to determine whether Applica Consumer</p> <p>19 Products, Inc. has complied with the reporting</p> <p>20 requirements of Section 15(b) of the CPSA regarding</p> <p>21 certain Black &amp; Decker brand Spacemaker coffee makers</p> <p>22 that were involved in the CPSC File Number RP090279</p>

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<p>1 and were recalled by the firm on June 23, 2009.      2 Do you see that?      3 A. Yes.      4 Q. So in June 2010, Spectrum was informed      5 that they were being investigated for a potential      6 timeliness violation under section B, right?      7 A. Right.      8 Q. And this case also involved Spacemaker      9 coffee makers, Black &amp; Decker brand, right?      10 A. Right.      11 Q. Does any of this ring a bell? Do you      12 remember reviewing this case?      13 A. Yeah, is this the second PI case, the      14 0725?      15 Q. Nope.      16 A. Or is this a different case?      17 Q. This is one of the cases that Applica      18 reported.      19 A. I'm just looking to see if it's in my      20 document list which you said it was not. I don't      21 know if I -- I don't recall if I read this letter      22 because it's not in the list of documents that I</p>	<p>1 the staff would have some reasonable basis to believe      2 there may be a violation.      3 Q. Would a firm receiving a letter like this      4 about a coffee maker be reasonable to think that      5 perhaps coffee makers present hazards that should be      6 reported?      7 A. I think they would have to take this into      8 consideration but Applica might have looked at this      9 and said, fine, the staff is investigating, we'll      10 provide them all the information that they're asking      11 for, but we don't think we had a reporting      12 obligation.      13 Q. They might have thought that but you don't      14 know that they did, right?      15 A. I don't know that they did.      16 Q. But this is a CPSC communication telling      17 the firm that they are being investigated for a      18 timeliness violation involving a coffee maker      19 presenting a burn hazard, right?      20 A. Yes.      21 Q. So this is after both of those two PI      22 cases on which Spectrum reasonably relied, right?</p>
<p style="text-align: center;">Page 235</p> <p>1 listed as having reviewed. So I don't think I saw      2 this letter.      3 Q. Now, this is a prior CPSC case involving      4 Applica, right?      5 A. Right.      6 Q. So under your analysis, Applica would be      7 reasonable in relying on this interaction with staff      8 in determining whether it needed to report the carafe      9 handle issue, right?      10 MR. MULLIN: Object to the form of the      11 question.      12 THE WITNESS: Well, this says that the      13 staff is investigating whether Applica -- whether it      14 believes Applica reported in a timely manner.      15 BY MR. ROSS:      16 Q. Does staff typically investigate      17 timeliness violations if it doesn't believe under any      18 circumstances the firm should have had to have      19 reported?      20 A. Well, it has to have some reasonable cause      21 to believe that there may have been a reporting      22 violation before it investigates. I would think that</p>	<p style="text-align: center;">Page 237</p> <p>1 A. Yes. Or I said they could have reasonably      2 relied.      3 Q. They could have reasonably relied?      4 A. Yes.      5 Q. Among other information?      6 A. Right.      7 Q. Now, in June 2010, Spectrum was receiving      8 significant numbers of complaints about carafe handle      9 failures, right?      10 A. In which case?      11 Q. Well, there is only one -- in the carafe      12 handle failures case.      13 A. Yes.      14 Q. So when Applica receives a letter saying      15 you're being investigated for this kind of potential      16 hazard, in assessing whether it should report the      17 carafe handle issue, it should take this into account      18 under your analysis, right?      19 A. It should take it into account but it      20 doesn't mean that it has a reporting obligation, so      21 they can account for it in any number of ways.      22 Q. Just like they can account in any number</p>

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<p>1 of ways the two PI cases, right?</p> <p>2 A. Yes.</p> <p>3 Q. And you're not making an assessment that</p> <p>4 that case was materially different in terms of the</p> <p>5 hazard of this case, right?</p> <p>6 A. Right. And I don't know if this case is</p> <p>7 still going on. I don't know if this case has been</p> <p>8 concluded. I don't know if they got a letter that</p> <p>9 says we're not pursuing any civil penalty.</p> <p>10 I'm kind of dealing with this in the</p> <p>11 abstract, that if they got a letter subsequent to</p> <p>12 this that says we closed our investigation, that's</p> <p>13 also a piece of information that they can take into</p> <p>14 account. If the investigation is still open, then</p> <p>15 that's a piece of information they have to take into</p> <p>16 account.</p> <p>17 And Applica -- and I can't speak for them</p> <p>18 because I don't know what's in their minds but they</p> <p>19 could very well believe that they didn't have a</p> <p>20 reporting obligation in this case, Government</p> <p>21 Exhibit 90, or in the instant case that's in</p> <p>22 litigation, and that may be their position that they</p>	<p>1 consistent with your own standard that you set forth</p> <p>2 in your report, you would need more information</p> <p>3 including information from this case, right?</p> <p>4 A. It would be helpful if I had all of this</p> <p>5 information.</p> <p>6 Q. I'm going to show you what's previously</p> <p>7 been marked as Government Exhibit 28.</p> <p>8 MR. MULLIN: Is this a good time for a</p> <p>9 quick break?</p> <p>10 MR. ROSS: Sure.</p> <p>11 (Recess.)</p> <p>12 BY MR. ROSS:</p> <p>13 Q. Mr. Schoem, I'm going to hand you what's</p> <p>14 been previously marked as Government Exhibit 28.</p> <p>15 Mr. Schoem, we talked about incident</p> <p>16 notifications and investigation reports earlier,</p> <p>17 right?</p> <p>18 A. Yes.</p> <p>19 Q. And have you seen this document before?</p> <p>20 A. I don't recall that I've seen it.</p> <p>21 Q. Well, does this appear to be a CPSC letter</p> <p>22 forwarding an epidemiologic investigation report</p>
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<p>1 don't have a reporting obligation in either case</p> <p>2 because they don't believe that they met the</p> <p>3 threshold criteria for reporting. And if the</p> <p>4 Commission still has this as an open case and wants</p> <p>5 to litigate with Spectrum on this case, then I</p> <p>6 suppose they could do that too.</p> <p>7 Q. I just want to establish what you're</p> <p>8 saying in terms of firms -- what they must do. In</p> <p>9 deciding whether or not a reporting obligation arose</p> <p>10 in this case, you're saying Applica should have sat</p> <p>11 down and considered not only the information in this</p> <p>12 case but the information from the two PI cases, from</p> <p>13 this particular RP case and all other information it</p> <p>14 had relating to coffee hazards, right?</p> <p>15 A. Right.</p> <p>16 Q. So absent that information, like the</p> <p>17 information from this case, you personally cannot</p> <p>18 make a determination of whether Applica should have</p> <p>19 reported, can you?</p> <p>20 A. I can only make my determination based on</p> <p>21 the documents that I reviewed.</p> <p>22 Q. And in order to make a determination</p>	<p>1 regarding a carafe handle failure involving the</p> <p>2 coffee makers in this case?</p> <p>3 A. Yes. And to the best of my knowledge,</p> <p>4 I've not seen this previously.</p> <p>5 Q. And this was sent to Applica on June 30th,</p> <p>6 2009 and you see there is a received stamp at the top</p> <p>7 that says July 6, 2009?</p> <p>8 A. Yes.</p> <p>9 Q. And if you take a look through it, you'll</p> <p>10 see that there is a narrative. Do you see that?</p> <p>11 A. What page are you looking at?</p> <p>12 Q. SB078149.</p> <p>13 A. Yes.</p> <p>14 Q. And there is a decently long narrative and</p> <p>15 one of the sentences says, "On the morning of</p> <p>16 March 30, 2009, the complainant began brewing</p> <p>17 approximately 10 cups of coffee in the incident</p> <p>18 coffee maker. Upon completion of the brewing, she</p> <p>19 grabbed the handle of the carafe and removed it from</p> <p>20 the warming plate."</p> <p>21 Do you see that?</p> <p>22 A. Yes.</p>

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<p>1       Q. And that's sort of how you would expect 2 someone to brew a pot of coffee and then grab it off 3 the coffee maker, right?</p> <p>4       A. Yes.</p> <p>5       Q. It continues, "While the complainant was 6 holding the carafe, the handle suddenly failed 7 causing hot coffee to spill on the kitchen 8 countertop, floor, and the complainant's hand and 9 foot," right?</p> <p>10      A. Yes.</p> <p>11      Q. "She explained that the plastic handle, 12 which appeared to be secured by one screw, had 13 detached which resulted in the carafe of hot coffee 14 to drop onto the countertop and spill." And then she 15 goes on to say that she had minor burns and she 16 didn't need medical attention, et cetera.</p> <p>17           Do you see all of that?</p> <p>18      A. Yes.</p> <p>19      Q. Now, this is another piece of information 20 that the company should have considered in deciding 21 whether to report the carafe handle case, right?</p> <p>22      A. Yes.</p>	<p>1       I would give it more weight than a complaint that I 2 got directly from a consumer. And this consumer 3 might very well complain to the company as well.</p> <p>4       Q. And this was sent to Applica three years 5 before it reported, right?</p> <p>6       A. Yes.</p> <p>7       Q. And it says, "For more information, please 8 call Mark Schoem." Do you see that part?</p> <p>9       A. Yes. I'm sorry, where is that?</p> <p>10      Q. Page 2. Sorry. Page 2.</p> <p>11      A. Of the Pam McDonald letter.</p> <p>12      Q. Well, anyways, "If you have any questions 13 regarding this letter, please email us at 14 clearinghouse@cpsc.gov." Do you see that?</p> <p>15      A. Yes.</p> <p>16      Q. And it's just basically inviting the 17 company to contact the Commission and it has your 18 brother's name and phone number up at the top, right?</p> <p>19      A. Yes.</p> <p>20      Q. You didn't review this document in forming 21 your conclusions in this case?</p> <p>22      A. No. Not that I'm aware of anyway.</p>
<p style="text-align: center;">Page 243</p> <p>1       Q. Because this is a letter from the CPSC 2 attaching one of the incidents received in this case, 3 right?</p> <p>4       A. Right.</p> <p>5       Q. And there is a cover letter at the top 6 which contains the language, "The reports we have 7 provided you may - either alone or with other 8 information you may now have or may later receive - 9 reasonably support a conclusion that the product 10 contains a defect which could create a substantial 11 product hazard," and goes on to say it might be 12 reportable, right?</p> <p>13      A. Right.</p> <p>14      Q. So whether or not you agree that this is 15 ultimately reportable, there is no question that this 16 is the kind of information that the company should 17 assess, right?</p> <p>18      A. Yes.</p> <p>19      Q. And do you think it has particular weight 20 because it's coming from the Commission?</p> <p>21      A. I think you pay attention to it because 22 it's coming from the Commission but I don't know that</p>	<p style="text-align: center;">Page 245</p> <p>1       Q. Do you know how many different incident 2 reports the company received from the CPSC alleging 3 carafe handle failures in the coffee maker at issue 4 in our case?</p> <p>5       A. No.</p> <p>6       Q. Do you know whether Spectrum or Applica 7 ever called the CPSC to discuss this issue?</p> <p>8       A. No. And they're not required to call the 9 Commission. If they want more information on 10 reporting, it says please call Mark Schoem but if -- 11 again, we're both speculating, I guess. If they felt 12 they had sufficient information to understand the 13 reporting obligation, they wouldn't have needed to 14 call Mark Schoem.</p> <p>15      Q. My question is, if they had wanted clarity 16 on whether they had to report this issue, they could 17 have called Mark, right?</p> <p>18      MR. MULLIN: Object to the form of the 19 question.</p> <p>20      THE WITNESS: They might have been clear 21 on their reporting obligation without contacting Mark 22 Schoem.</p>

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<p>1 BY MR. ROSS:</p> <p>2 Q. I'm saying if they wanted to, they could 3 have called the Commission and discussed this issue?</p> <p>4 A. They could have.</p> <p>5 Q. And do you think Mark Schoem would have 6 had that discussion with them?</p> <p>7 MR. MULLIN: Object to the form of the 8 question.</p> <p>9 THE WITNESS: I can speculate. Probably.</p> <p>10 BY MR. ROSS:</p> <p>11 Q. He's not among the people at the CPSC who 12 would have lacked the self-confidence to discuss 13 whether a case should be reported, right?</p> <p>14 A. Right.</p> <p>15 Q. He was pretty assertive in his opinions, 16 right?</p> <p>17 A. Yes.</p> <p>18 Q. And he has a pretty decent understanding 19 of the reporting requirements, right?</p> <p>20 A. Yes.</p> <p>21 Q. So if there was doubt, they could have 22 called? That's all I'm asking.</p>	<p>1 were received from the CPSC, correct?</p> <p>2 A. Yes.</p> <p>3 Q. In addition to the firm's notice that it 4 was being investigated for a timeliness violation 5 regarding another Spacemaker coffee maker, right?</p> <p>6 A. Yes.</p> <p>7 Q. It's all information that you consider or 8 could consider reasonably in your opinion?</p> <p>9 A. Yes.</p> <p>10 Q. Now, in PI050023, you've noted that there 11 were allegations of serious burns in that case, 12 right?</p> <p>13 A. Yes.</p> <p>14 Q. And were those serious burns caused by 15 coffee?</p> <p>16 A. They were caused, to my recollection, by 17 hot liquid spilling, probably coffee, yes, spilling 18 on the consumer.</p> <p>19 Q. Do you know whether the coffee maker or 20 the liquid in that case was of a different 21 temperature than the liquid in our case, the instant 22 case?</p>
<p>1 A. They could have. 2 I will note that when companies called, 3 they usually called anonymously. In my experience, 4 they didn't identify -- they usually have their 5 lawyers call. 6 Q. Looking back at your report, please, 7 page 13, Exhibit 85. 8 A. Yes. 9 Q. Now, you reference PI050023, the Home Cafe 10 case, right? 11 A. Yes. 12 Q. And you also mention PI070025, right? 13 A. Yes. 14 Q. And those are two of the cases you say 15 that Spectrum could have and perhaps should have 16 considered in deciding whether to report carafe 17 handle failures, right? 18 A. Yes. 19 Q. In addition to the West Bend settlement, 20 right? 21 A. Yes. 22 Q. In addition to the incident reports that</p>	<p>1 A. No. 2 Q. Do you know whether the volumes of liquid 3 that were being spilled on people or could have been 4 spilled on people in that case are different from the 5 volumes at issue in our case? 6 A. Bear with me one minute. 7 I can't recall offhand what the incidents 8 were in that case and whether they were -- it seems 9 to me it was hot liquid being spewed forth from a 10 pot. I don't -- you can help me if you want. I 11 don't remember if this is the pod case or not with 12 hot liquid spilling out. 13 Q. My question is, is it the type of liquid 14 or the temperature and volume that determines the 15 potential injury? 16 A. It's the temperature and volume. 17 Q. So if it was the same temperature and 18 volume in the two cases and if it were to spill on 19 the consumer in both cases, the extent of possible 20 injury would be the same, wouldn't it? 21 A. Yes. But that also would allow Spectrum 22 to look at how the Commission handled 0023 where it</p>
	63 (Pages 246 to 249)

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<p>1 closed the cases concluding no substantial product      2 hazard, but the incidents that Spectrum was getting      3 in the instant case were not of the same nature as      4 the incidents that were getting in 0023.</p> <p>5 Q. Now, you said the risk in this case is      6 greater, right, than the current case?</p> <p>7 MR. MULLIN: Object to --</p> <p>8 THE WITNESS: In 0023, I said that the      9 injuries appeared to be more severe and more serious.      10 BY MR. ROSS:</p> <p>11 Q. Well, the injuries were more severe; I'm      12 asking about the risk. Is the possible injury from a      13 carafe handle falling off and spilling hot coffee on      14 somebody different from the risk of an injury posed      15 by the failures that were occurring in this case also      16 involving hot coffee?</p> <p>17 A. If this case was a pod case, I mean, my      18 opinion, and it's my personal opinion, would be that      19 the carafe case is less risky than if I've got my      20 face near a pod that's exploding and spewing forth      21 hot liquid.</p> <p>22 Q. And are you basing that on some scientific</p>	<p>1 Q. But you're not basing that on knowledge of      2 how hot the liquid was, right?</p> <p>3 A. I'm basing it on the incidents that were      4 reported to have occurred.</p> <p>5 Q. So you're analyzing the injuries that      6 actually happened and then comparing the cases      7 retrospectively?</p> <p>8 A. Yes. But the incidents were coming in      9 fairly close to the beginning, I thought. In 2008 or      10 so, the incidents started occurring and so      11 Applica/Spectrum would at least understand the nature      12 of the incidents that were occurring at that time.      13 They would presumably, if they did what they said      14 they did, have information about other injuries that      15 had occurred with other of their coffee makers that      16 were very serious and the Commission said, eh,      17 doesn't rise to the level of a substantial hazard,      18 we're closing the case, and they could have taken      19 that into consideration.</p> <p>20 Q. Now, in footnote 1 on page 14 of your      21 report -- and it might be helpful to have these two      22 exhibits, 91 and 85, next to each other just so we</p>
<p style="text-align: center;">Page 251</p> <p>1 literature?</p> <p>2 A. Nope. I'm basing it on personal point of      3 view. If I've got a carafe in my hand, it's not      4 going to be -- less likely to be near my face. I'm      5 just thinking about the way I, as an ordinary      6 consumer, take the carafe out of a coffee maker and      7 pour it into a cup.</p> <p>8 Q. So sitting here today, you don't actually      9 know whether the failure mode in this case was      10 capable of causing more severe injuries than the      11 failure mode in the case that's the subject of this      12 lawsuit?</p> <p>13 MR. MULLIN: I'm sorry, I object to the      14 form of the question. You used "this case" and "this      15 lawsuit" and I'm not sure what you're referring to.      16 BY MR. ROSS:</p> <p>17 Q. Sitting here today, can you say that the      18 risk of injury in PI 050023 was different than the      19 risk of injury in the carafe handle case?</p> <p>20 A. From the documents I read, it's my view      21 that the risk of injury in PI 050023 was greater than      22 the risk of injury in the instant carafe handle case.</p>	<p style="text-align: center;">Page 253</p> <p>1 wrap up here.</p> <p>2 MR. MULLIN: I don't think you've given us      3 91.</p> <p>4 MR. ROSS: Oh, I'm sorry. I'm going to      5 mark as Government Exhibit 91.      6 (Government Exhibit No. 91 was      7 marked for identification.)</p> <p>8 BY MR. ROSS:</p> <p>9 Q. Do you recognize this document?</p> <p>10 A. Yes.</p> <p>11 Q. Is this a close letter from PI 050023?</p> <p>12 A. Yes, it is.</p> <p>13 Q. And in the first paragraph, it states,      14 "While the staff believes it was appropriate for your      15 client to report to the Commission, based upon the      16 information currently available, the staff does not      17 believe the nature and degree of the risk of injury      18 presented by this product necessitate action by the      19 Commission under Section 15."</p> <p>20 Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. And it's this sentence here along with the</p>

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<p>1 information that Applica knew about this case that      2 you say they could have relied on in deciding whether      3 to report the carafe handle failures, right?</p> <p>4 A. Not so much this sentence because if I      5 were Spectrum/Applica and I had gotten this letter, I      6 might scratch my head, at least the lawyers might      7 scratch their heads and say, well, we didn't      8 proactively report.</p> <p>9 I think this is -- as I said in my      10 footnote, I think this is the wrong letter. It's      11 boilerplate when a company affirmatively reports to      12 the Commission under the conventional program, the      13 staff evaluates, reaches the conclusion that the risk      14 doesn't rise to the level of a substantial hazard and      15 they send them this letter. It's not the letter that      16 I've seen or that, when I was at the Commission, that      17 we would use when the staff was closing a PI case or      18 a CA case.</p> <p>19 Q. So you're saying that Applica, upon      20 receiving this letter, reasonably could assume that      21 this was just a wrong letter?</p> <p>22 A. They reasonably could assume that, well,</p>	<p>1 found no substantial product hazard but it looks like      2 they sent the wrong letter or it's the wrong      3 boilerplate because you didn't proactively report to      4 the Commission, you reported in response to the      5 staff's request for a report.</p> <p>6 BY MR. ROSS:</p> <p>7 Q. So this is another situation where the      8 firm got information and you think there might be a      9 reasonable basis to not place much weight on it?</p> <p>10 A. Not place weight on the sentence that      11 says, "While the staff believes it was appropriate      12 for your client to report," because again, the client      13 reported in response to the staff request. This is a      14 management issue at CPSC where compliance staff need      15 to be trained on using the right form letter for the      16 right types of cases.</p> <p>17 Q. So the words "it was appropriate to      18 report" means you don't need to report --</p> <p>19 A. No, it -- sorry.</p> <p>20 MR. MULLIN: Object to the form of the      21 question.</p> <p>22 THE WITNESS: Didn't mean to overtalk you.</p>
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<p>1 what the staff is talking about is that it was nice      2 of you to report in response to our request that you      3 report. So it could be the staff believes it's      4 appropriate for your client to report to the      5 Commission. Well, the only reason Applica reported      6 to the Commission in this case is because the staff      7 sent them a letter saying we initiated an      8 investigation, please submit a full report.</p> <p>9 Q. So you think when Applica sees a letter      10 that says Section 15(b) of the CPSC, 15 USC 2064(b),      11 it should assume it means something other than      12 Section 15(b) of the CPSA, 15 USC 2064(b)?</p> <p>13 MR. MULLIN: Object to the form of the      14 question.</p> <p>15 THE WITNESS: That's not quite what I'm      16 saying. Kerrie Campbell is an experienced      17 practitioner before the Commission and she knew that      18 the company had not proactively reported to the CPSC.      19 When she got this letter -- if I had received this      20 letter -- if this had been my client and I had      21 received this letter, I would have said to the      22 client, well, they're closing the investigation, they</p>	<p>1 It means it was appropriate to report in response to      2 the staff's request that you submit a report.</p> <p>3 BY MR. ROSS:</p> <p>4 Q. That's your assumption, right?</p> <p>5 A. That's what happened.</p> <p>6 Q. That's not what the letter says.</p> <p>7 MR. MULLIN: Object to the form of the      8 question.</p> <p>9 BY MR. ROSS:</p> <p>10 Q. I'm just asking if it's your      11 interpretation of what this letter is or if that's      12 what the letter actually says.</p> <p>13 A. The letter doesn't say you had an      14 obligation to report. It doesn't say you were      15 required to report. This company reported in      16 response to the staff request, so I think a      17 reasonable interpretation is while the staff believes      18 it appropriate for your client to report, it's to      19 report in response to the request of the staff that      20 you submit a report. That's how this came about.</p> <p>21 Q. I would like to ask you a couple of      22 questions about page 15 of your report, please. Is</p>

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<p>1       this the section of your report where you talk about      2       the other Section 15 cases of which Applica had no      3       knowledge?</p> <p>4       A. Yes.</p> <p>5       Q. And you testified before that because it      6       had no knowledge of them, it couldn't reasonably rely      7       on them, right?</p> <p>8       A. That's correct.</p> <p>9       Q. Now, in looking at these cases, did you do      10      some sort of statistical analysis comparing the      11      incidents and injuries in each case?</p> <p>12      A. No.</p> <p>13      Q. And yet you've come to the conclusion that      14      the risk of injury in each case is consistent, right?</p> <p>15      A. Well, the staff presumably did a risk      16      analysis in assessing the risk in these cases because      17      the staff knew how many products were in the      18      marketplace. It knew that it had some number of      19      incidents with each of those cases. It knew that      20      there could be additional future incidents of the      21      same nature with this product.</p> <p>22      If there was a defect in the product, then</p>	<p>1       we're closing the case.</p> <p>2       Again, that's where the hazard      3       classification comes into play in that the staff      4       should be consistent in its decision making when      5       there are the same or essentially identical or      6       similar risks presented. In each of these cases, the      7       risk was hot liquid contacting the consumer's skin.      8       And in each of those cases, with that one exception,      9       the staff concluded that the hot liquid contacting a      10      consumer's skin doesn't rise to the level of a      11      substantial hazard even though there may have been      12      medical injuries, medical treatment.</p> <p>13      Q. I'm listening. Was that your whole      14      answer?</p> <p>15      A. That's my answer. I'll wait until you're      16      done.</p> <p>17      Q. So staff had a consistent methodology in      18      risk analysis that applied in all these cases and      19      then suddenly it applied something different in      20      RP090423, is that your estimation?</p> <p>21      A. That's what it appears to have done.</p> <p>22      Q. And again, you're inferring that based</p>
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<p>1       there was a defect in all of the products. And if      2       the staff was concerned about this defect manifesting      3       itself in a way that presented a significant risk of      4       injury, it presumably wouldn't have closed these      5       cases but instead would have said, we're converting      6       these to CA cases and we want you to do a recall.</p> <p>7       Q. So you didn't do an analysis, but you're      8       inferring that based on what staff ultimately did in      9       these cases, right?</p> <p>10      A. Well, the staff has a PD form and that's      11      their risk analysis. That's the analysis that the      12      staff has done of the risk presented by these      13      products.</p> <p>14      Q. So you didn't do a statistical analysis      15      but you're inferring that these are all consistent      16      risks based on the CPSC staff's ultimate disposition      17      of each case, right?</p> <p>18      A. That's their ultimate disposition and      19      their rationale for the disposition. In each of      20      those cases, the staff believed that there was a      21      defect. In each case, they said the defect doesn't      22      rise to the level of a substantial product hazard,</p>	<p>1       upon the ultimate disposition of this case as opposed      2       to the other seven or eight that you considered,      3       right?</p> <p>4       A. I'm basing it on the documents that I      5       reviewed in this case.</p> <p>6       Q. Which were the preliminary determination      7       forms, right?</p> <p>8       A. Well, there were some other documents in      9       there. There was full report information, there was,      10      in some cases, incident information.</p> <p>11      Q. And you reviewed all those documents?</p> <p>12      A. Yes.</p> <p>13      Q. And you performed some sort of risk      14      analysis yourself where you compared information from      15      each case to determine that they were consistent?</p> <p>16      A. I didn't do a statistical or a formal      17      analysis. I made notes of how many incidents were in      18      each case. I made notes of how many products were      19      involved in each case.</p> <p>20      But ultimately what I was looking at is      21      what's the risk. The risk is hot liquid contacting a      22      consumer's skin. In some cases, it might be from a</p>

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<p>1      pod exploding. In other cases, it might be from a      2      carafe handle breaking. And again, what was      3      consistent, with one exception, was the way the staff      4      treated those cases.</p> <p>5      You know, it was interesting -- there were      6      just a number of different compliance officers who      7      handled those different cases and they all came to      8      the same conclusion with one exception.</p> <p>9      Q. Is it your testimony that the CPSC has a      10     policy that hot liquid contacting skin cannot be a      11     substantial product hazard?</p> <p>12     A. No, I didn't say that. In these cases,      13     the Commission staff concluded that hot liquid      14     contacting skin from coffee makers did not rise to      15     the level of a substantial product hazard. Could      16     there be a different case, different circumstances?      17     Perhaps.</p> <p>18     Q. So at the end of the day, is your opinion      19     anything other than certain cases were consistent and      20     one case was inconsistent?</p> <p>21     MR. MULLIN: Object to --      22     BY MR. ROSS:</p>	<p>1      fact, there was -- in one of the cases, and I think      2      it was in the one that ends in 27, the engineer is      3      basically saying why are you sending me more hot      4      water contact cases? You know, this isn't a problem      5      and we've checked with health sciences and they don't      6      think it's a problem.</p> <p>7      Q. Are you sure that that characterization of      8      that document is accurate?</p> <p>9      A. All I can tell you is what I read in the      10     document. That's what the document says.</p> <p>11     Q. What was the temperature of the liquid      12     discussed in that document?</p> <p>13     A. He says it would help to know what the      14     temperature is and there was some back and forth      15     about, well, have you gone to human factors or have      16     you gone to health sciences to evaluate that      17     information?</p> <p>18     Q. Are you sure he doesn't say exactly how      19     hot the water was in that document?</p> <p>20     A. I don't recall him saying exactly how hot      21     the water was.</p> <p>22     Q. Do you recall he said that the water was</p>
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<p>1      Q. Is that just the sum total of this      2      opinion?</p> <p>3      MR. MULLIN: Object to the form of the      4      question.</p> <p>5      THE WITNESS: In the coffee maker cases,      6      the staff's position was consistent that hot liquid      7      contacting consumer's skin causing -- resulting in      8      scalding, whatever that term means, but they use the      9      term scalding, resulting in burns, resulting in first      10     degree burns and resulting in second degree burns did      11     not rise to the level of a substantial product      12     hazard. And the staff closed seven or eight or nine      13     cases. And in one case, they made a preliminary      14     determination of hazard and sought a recall.</p> <p>15     BY MR. ROSS:</p> <p>16     Q. And that's all just factual information in      17     your opinion?</p> <p>18     A. It's all factual information but I think      19     it's something that companies -- there sure is a      20     pattern among the compliance staff that it doesn't      21     think hot liquid from coffee makers contacting      22     consumer's skin is particularly hazardous. And in</p>	<p>1      close to 150 degrees?</p> <p>2      A. I don't recall that.</p> <p>3      Q. Do you know how that compares to the      4      coffee makers in this case?</p> <p>5      A. No.</p> <p>6      Q. Do you know what the medical literature      7      says hot water can do to skin at 150 degrees as      8      opposed to 190 degrees?</p> <p>9      A. No, but regardless of what it says, the      10     water presumably in some of these other cases that      11     the Commission closed -- and I don't know whether      12     they did that assessment as to how hot the water got.      13     All I can look at is the documents and the decisions      14     that the Commission compliance staff made that it was      15     closing these other cases.</p> <p>16     Q. So you don't think it would be relevant      17     whether the water in one case was hotter than the      18     other in terms of the risk the coffee maker      19     presented?</p> <p>20     A. I don't see that the staff took that into      21     account, at least in the documents that I reviewed.</p> <p>22     Q. So is it now CPSC policy that the</p>

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<p>1      temperature of the water doesn't matter in 2      determining the risk of scalding -- 3          A. I don't know -- 4          Q. -- which, by the way, means burn caused by 5           hot liquid. 6          A. You would have to ask CPSC if that's what 7           they believe. 8          Q. In order to do that, I could call somebody 9           like your brother when he was still there, right? 10         A. I don't think he would know. He's not a 11           physiologist. You would have to go to somebody in 12           health sciences and ask them. 13         Q. Sitting here today, you are not a medical 14           doctor, right? 15         A. Nope. 16         Q. And you haven't read any literature on the 17           potential injuries from hot water or any kind of 18           liquid, right? 19         A. I read one document that talked about 20           scalds, but I only skimmed it. It was the -- let me 21           see if I can identify it. The econometric report, 22           Scald Hazards.</p>	<p>1      entitled to rely on things that the CPSC says? 2                    MR. MULLIN: Object to the form of the 3                    question. 4                    THE WITNESS: I don't know whether the 5                    government produced all of the documents that were 6                    requested in this case so that I could have read -- 7                    if you're suggesting there are additional documents 8                    that I didn't have access to that would lead me to 9                    reach a different conclusion than I reached, then 10                    it's correct, then -- if in fact there are other 11                    documents that I didn't read, then, sure, if I read 12                    those documents, maybe I would reach a different 13                    conclusion. 14                    But I'm not aware of those documents, I 15                    didn't see those documents, and so my analysis, my 16                    opinion, my report is based on the documents that I 17                    did in fact review. And I thought the government had 18                    provided all the documents in the closed cases with 19                    that one exception where I didn't see any documents. 20                    Q. Can you look at page 16, please? 21                    Do you see the paragraph that starts with, 22                    "Spectrum was on notice"?</p>
<p style="text-align: center;">Page 267</p> <p>1          Q. Which doesn't discuss temperature at all, 2          does it? 3          A. I don't recall. 4          Q. So sitting here today, you can't say 5           whether water temperatures at the -- strike that. 6          Sitting here today, you can't say that 7           coffee at the temperature of volumes these coffee 8           makers were designed to achieve can cause severe 9           burns or serious injury as those terms are used in 10           the CPSA? 11         A. I can't say that and I didn't see in any 12           of the PDs that the staff made that I reviewed, I 13           don't recall them talking about the temperature of 14           the water was an issue or a reason or a factor in why 15           they closed those cases. All I can do is base my 16           information on what I read. 17         Q. And if what you read doesn't include all 18           pertinent information, then what kind of conclusions 19           can you actually draw? 20         MR. MULLIN: Object to form. 21         BY MR. ROSS: 22         Q. Other than the firm in your opinion is</p>	<p style="text-align: center;">Page 269</p> <p>1          A. Yes. 2          Q. Now, you're an attorney, right? 3          A. Yes. 4          Q. And in the law, notice is a loaded word, 5           isn't it? 6                    MR. MULLIN: Object to the form of the 7                    question. 8                    THE WITNESS: I wasn't using it in a legal 9                    sense. 10                    BY MR. ROSS: 11         Q. So when you're saying notice here, you're 12           not arguing that Spectrum had notice in a due process 13           sense, are you? 14         A. No, I'm just saying that they were 15           informed. 16         Q. Aware of or something like that? 17         A. Aware of, yes. 18         Q. In the last sentence of that paragraph, 19           "There is no evidence that staff communicated with 20           Spectrum a different position in the relevant time 21           period." Do you see that? 22         A. Yes.</p>

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<p>1       Q. Now, when you wrote that sentence, you      2 weren't taking into account the epidemiologic      3 investigation report that staff sent to them, right?      4       A. Right.      5       Q. And you weren't taking into account the      6 June 24th, 2010 investigation letter saying that they      7 were under investigation for a potential timeliness      8 violation, right?      9       A. Wait, can we up on that though? Because      10 I'm saying there is no evidence that the staff      11 communicated with Spectrum a different position in      12 the time period, which is not -- I mean, that -- that      13 epidemiologic report is not the staff taking a      14 different position with respect to the significance      15 of burns. They're passing on to the company an      16 in-depth investigation that they had conducted of a      17 consumer who said her carafe handle broke and she      18 received a minor burn.      19       Q. You're not saying here that Spectrum      20 didn't have other information bearing on the issue of      21 the CPSC's view of whether hot coffee scalds might be      22 reportable, right?</p>	<p>1       about hot coffee causing serious burns. They had      2 reported the incidents of course to the Commission in      3 the previous cases so presumably they knew something      4 about the potential risk.      5 BY MR. ROSS:      6       Q. So you don't know what Spectrum knew about      7 this?      8       A. Right.      9       Q. And Spectrum and the CPSC, but nobody else      10 knew about the PI 050023 case, right?      11       A. Right. As far as I know, nobody else      12 outside of Spectrum and the CPSC and Spectrum's      13 attorneys knew about it.      14       Q. And in your opinion, that might impact      15 Spectrum's reporting obligation but not other firms,      16 right?      17       A. Right.      18       Q. So this was just a little secret between      19 the Agency and Spectrum?      20       MR. MULLIN: Objection to the form of the      21 question.      22 THE WITNESS: The Commission doesn't make</p>
<p>1       A. No. This is going to the information      2 that's in the non-Spectrum -- primarily the      3 non-Spectrum cases.      4       Q. Now, in addition to this information,      5 Spectrum was on notice of the Consumer Product Safety      6 Act, right?      7       A. Yes.      8       Q. And it was on notice of the interpretative      9 regulations that the CPSC has promulgated, correct?      10       A. They should be, yes.      11       Q. And they were on notice of the recall      12 handbook that the CPSC has issued, correct?      13       A. I would expect that they would be.      14       Q. And they were on notice of the West Bend      15 settlement which was published, right?      16       A. They should be.      17       Q. And they presumably knew of the common      18 sense proposition that hot coffee can cause serious      19 burns, right?      20       MR. MULLIN: Object to the form of the      21 question.      22 THE WITNESS: I don't know what they knew</p>	<p>1       public its preliminary determinations, the Commission      2 doesn't make public what it does with other      3 companies, so it's secret in the sense that the      4 Commission is precluded from disclosing this      5 information by statute to other companies or to the      6 public.      7 BY MR. ROSS:      8       Q. Now, finally, you say that the CPSA is not      9 an incident reporting system and the number of      10 incidents doesn't affect the risk, right?      11       A. I said that the CPSA reporting requirement      12 is not an incident reporting system meaning that the      13 law does not require each incident of a product      14 failure or injury to be reported.      15       Q. Is that the government's allegation in      16 this case?      17       A. Whether it is or isn't, I would have to go      18 back and look at the complaint but I'm just making      19 the point that just because companies have incidents      20 doesn't necessarily mean that those incidents are      21 reportable to the Commission under the reporting      22 requirement.</p>

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<p>1       Q. And you state here that the risk of injury      2       in this case is the same regardless of the number of      3       incidents, right?</p> <p>4       A. Yes.</p> <p>5       Q. And are you saying -- by that, do you mean      6       in the event of a carafe handle failure, the      7       potential injury is the same regardless of the number      8       of failures that different customers experience? Is      9       that what you're saying?</p> <p>10      A. I'm not necessarily limiting it to this      11     case except to the extent that I do in the last      12     sentence. I mean, I think this is across the board.      13     The reporting requirement does not say you have to      14     report every incident that occurs with a product. It      15     says you have to report information, which could      16     include incidents, but includes lot of other      17     information. You have to report information that      18     reasonably supports the conclusion that there is a      19     defect that could create.</p> <p>20      Q. So if Spectrum sat down in early 2008 and      21     decided not to report this because it didn't think it      22     had a reporting obligation, is it your testimony that</p>	<p>1       Q. Yes.</p> <p>2       A. Based on the documents that I reviewed,      3       it's my opinion that they didn't have a reporting      4       obligation.</p> <p>5       Q. And in doing that, you're not applying any      6       law?</p> <p>7       A. No, I'm applying -- I'm looking at the      8       facts of this case and giving my opinion as to      9       whether I believe Spectrum had a reporting      10      obligation.</p> <p>11      Q. Under the Consumer Product Safety Act,      12      right?</p> <p>13      A. Under the Consumer Product Safety Act.</p> <p>14      Q. And you haven't reviewed all the      15      information from all of these cases to your      16      knowledge, have you?</p> <p>17      A. Again, I said that this opinion is based      18      on the documents that I have reviewed.</p> <p>19      Q. And you don't know what Spectrum sat down      20      and actually discussed and considered between 2008      21      and 2012, right?</p> <p>22      A. Right.</p>
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<p>1       Spectrum is justified in ignoring all 1,500 or so      2       consumer complaints that they received after that      3       date?</p> <p>4       MR. MULLIN: Object to the form of the      5       question.</p> <p>6       THE WITNESS: If I were a company and I      7       was getting -- continuing to get complaints, I would      8       continue to look at those complaints to see if they      9       changed the nature of the risk, to see if I was now      10      getting reports of second or third degree burns. I      11      would look to see if I had numerous reports of      12      medical treatment, and that might change my mind as      13      to whether I had a reporting obligation.</p> <p>14      BY MR. ROSS:</p> <p>15      Q. I just want to briefly touch on your      16      conclusions again so that I understand what you've      17      testified to today. Is it your conclusion that      18      Spectrum did not in fact have a reporting obligation?</p> <p>19      MR. MULLIN: Object to the form of the      20      question.</p> <p>21      THE WITNESS: In this case?</p> <p>22      BY MR. ROSS:</p>	<p>1       Q. So your entire opinion is basically had      2       Spectrum sat down and discussed the information that      3       you considered, that you think they would have had a      4       reasonable basis not to report?</p> <p>5       A. That's correct.</p> <p>6       Q. And that's your understanding of what the      7       reporting requirement is, right?</p> <p>8       A. What's my understanding of the reporting      9       requirement? I don't understand your question.</p> <p>10      MR. MULLIN: I object to the form of the      11      question.</p> <p>12      BY MR. ROSS:</p> <p>13      Q. In your report, you do not address the      14      regulatory factors under the CPSC's regulations, do      15      you?</p> <p>16      A. When you say the regulatory factors, are      17      you talking about the interpretive rule that the      18      Commission has issued?</p> <p>19      Q. Yes. You don't address those regulations      20      in this report, do you?</p> <p>21      A. Well, I don't specifically address them      22      but do take into account the likelihood of injury,</p>

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<p>1       the severity of the risk of injury. When I say they      2       didn't have a reporting obligation, it's because the      3       information doesn't reasonably lead to a conclusion      4       that there was a defect that could create a      5       substantial product hazard or creates an unreasonable      6       risk of serious injury or death.</p> <p>7       So yes, I am taking into account the      8       regulatory provisions in the Commission's      9       interpretative rule and in the statute.</p> <p>10      Q. So you assessed the facts of this case      11     under the reporting standard as you understand it and      12     came to a conclusion that they do not have an      13     obligation to report?</p> <p>14      A. Based on the documents that I reviewed, I      15     reached the conclusion that they did not have an      16     obligation to report.</p> <p>17      Q. Second, you state that the CPSC      18     consistently has concluded that there is a moderate      19     risk from these kind of coffee spills and that they      20     don't rise to a substantial product hazard, right?</p> <p>21      A. I'm saying that the staff consistently      22     concluded that, yes.</p>	<p>1       does not mean 100 percent unanimous. It means      2       regularly or routinely.</p> <p>3       Q. And finally, you opine that Spectrum      4       systems and programs for compliance with the CPSA are      5       reasonable, right?</p> <p>6       A. Yes, that they -- I concluded that the      7       aspect of their -- the aspect of what I looked at in      8       terms of information that Spectrum considers that I      9       identified in my report, that that's appropriate      10      information to consider and to use to form a      11      determination as to whether there is a reporting      12      obligation.</p> <p>13      Q. But you did not investigate how the      14      systems actually work in practice, right?</p> <p>15      A. That's correct.</p> <p>16      MR. ROSS: Thank you for your time.</p> <p>17      MR. MULLIN: I have a couple of questions      18      but I want to take a couple of minutes.</p> <p>19      MR. ROSS: Go ahead.</p> <p>20      (Recess.)</p> <p>21      EXAMINATION BY COUNSEL FOR DEFENDANT      22      BY MR. MULLIN:</p>
<p style="text-align: center;">Page 279</p> <p>1       Q. And you did not perform some sort of      2       statistical comparison. You're just saying the staff      3       reached consistent conclusions in these cases, right?</p> <p>4       A. I'm saying they restate consistent      5       conclusions and I looked at the documents that the      6       staff -- that's in the files that were provided to me      7       that the staff relied on to reach those conclusions.</p> <p>8       Q. So you did perform some sort of analysis      9       that's not described in your report?</p> <p>10      A. I reviewed the document -- I think I've      11     answered this before. I reviewed the documents that      12     were provided to me and, based on my review of those      13     documents, it appears to me that the staff was      14     consistent in concluding that when hot water, hot      15     liquids from coffee makers contact a consumer's skin,      16     that that did not rise to the level of a substantial      17     hazard, and I'm reflecting what the staff concluded      18     in the cases that I reviewed.</p> <p>19      Q. And you excluded one case as an      20     aberration, right?</p> <p>21      A. I excluded one case as an aberration and,      22     as I also said at the beginning, consistent to me</p>	<p style="text-align: center;">Page 281</p> <p>1       Q. Mr. Schoem, as part of your review, did      2       you have an opportunity to review the full report      3       that was filed by Spectrum in connection with this      4       case?</p> <p>5       A. Yes.</p> <p>6       Q. And is the full report -- and that's a      7       document that's requested by the CPSC, correct?</p> <p>8       A. Yes.</p> <p>9       Q. And is that a document that provides the      10      information that the CPSC staff typically used to      11      evaluate a hazard and a remedy?</p> <p>12      A. Yes.</p> <p>13      Q. You were asked about Government Exhibit      14      Number 28, which is an IDI?</p> <p>15      A. Yes.</p> <p>16      Q. Would you take a moment to just skim      17      through that IDI? And let me ask -- I want you to do      18      that but let me ask my question first.</p> <p>19      My question is, I want you to look at that      20      IDI and tell me whether or not there is anything in      21      that IDI that's inconsistent with what you saw in the      22      full report materials that you reviewed.</p>

<p style="text-align: right;">Page 282</p> <p>1        A. Okay. (Witness complies.)      2              There is nothing in the IDI that is      3              inconsistent with what I read in the full report.      4              And I see in here that she did contact the company.      5              Q. In anything that you reviewed in      6              connection with this case, did you see any evidence      7              that consumers have reported second degree burns as a      8              result of any failure?      9              A. No, not in the documents that I looked at.      10          Q. In the documents that you reviewed in      11          connection with PI050023 and PI070025, did you see      12          evidence that consumers had reported second degree      13          burns in connection with those cases?      14          A. Yes, I did, in both cases.      15          MR. MULLIN: That's all I have.      16          MR. ROSS: Appreciate you taking the time.      17          THE WITNESS: Thank you.      18          MR. MULLIN: We do want to read and sign.      19          (Whereupon, at 4:00 p.m., the taking of      20          the instant deposition ceased.)</p>	<p style="text-align: right;">Page 284</p> <p>1              CERTIFICATE OF DEPONENT      2              I hereby certify that I have read and examined the      3              foregoing transcript, and the same is a true and      4              accurate record of the testimony given by me.      5              Any additions or corrections that I feel are      6              necessary, I will attach on a separate sheet of      7              paper to the original transcript.      8      9              Signature of Deponent      10          I hereby certify that the individual representing      11          himself/herself to be the above-named individual,      12          appeared before me this _____ day of _____,      13          2016, and executed the above certificate in my      14          presence.      15      16      17          NOTARY PUBLIC IN AND FOR      18      19      20          County Name      21      22          MY COMMISSION EXPIRES:</p>
<p style="text-align: right;">Page 283</p> <p>1        Notice Date: May 6, 2016      2        Deposition Date: April 29, 2016      3        Deponent: Alan H. Schoem      4        Case Name: US v. Spectrum Brands, Inc.      5        Page:Line      Now Reads      Should Read      6        _____      7        _____      8        _____      9        _____      10       _____      11       _____      12       _____      13       _____      14       _____      15       _____      16       _____      17       _____      18       _____      19       _____      20       _____      21       _____      22       _____</p>	<p style="text-align: right;">Page 285</p> <p>1              CERTIFICATE OF REPORTER      2              UNITED STATES OF AMERICA ) ss.:      3              DISTRICT OF COLUMBIA )      4              I, MARY GRACE CASTLEBERRY, RPR, the officer      5              before whom the foregoing deposition was taken, do      6              hereby certify that the witness whose testimony      7              appears in the foregoing deposition was duly sworn by      8              me; that the testimony of said witness was taken by      9              me to the best of my ability and thereafter reduced      10          to typewriting under my direction; that I am neither      11          counsel for, related to, nor employed by any of the      12          parties for the action in which this deposition was      13          taken, and further that I am not a relative or      14          employee of any attorney or counsel employed by the      15          parties thereto, nor financially or otherwise      16          interested in the outcome of the action.      17      18          -----      19          Notary Public in and for      20          The District of Columbia      21      22          My commission expires: 07/14/2016</p>

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Alan H. Schoem

Washington, D.C.

April 29, 2016

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1 CERTIFICATE OF DEPONENT

2 I hereby certify that I have read and examined the  
3 foregoing transcript, and the same is a true and  
4 accurate record of the testimony given by me.  
5 Any additions or corrections that I feel are  
6 necessary, I will attach on a separate sheet of  
7 paper to the original transcript.

Allen H. Schoem

8 Signature of Deponent

9  
10 I hereby certify that the individual representing  
11 himself/herself to be the above-named individual,  
12 appeared before me this 19 day of May,  
13 2016, and executed the above certificate in my  
14 presence.

Anthony L. Grant Jr.

15  
16  
17 NOTARY PUBLIC IN AND FOR

Montgomery

18  
19 County Name  
20  
21

22 MY COMMISSION EXPIRES:

ANTHONY L GRANT JR  
NOTARY PUBLIC  
MONTGOMERY COUNTY MARYLAND  
MY COMMISSION EXPIRES 7/20/2016

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7	31 14	rises to	rise to
8	31 17	are triggered	are NOT triggered
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10	101 13	a nuisance element	a nuisance settlement
11	128 20	staff was then as	staff today is as
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14	185 2	to see either <del>the</del> risk	to see the risk
15	210 15	outside of companies	outside of CPSC
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